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ABSTRACT

This report reviews and summarizes 28 reports on the status and enforcement of civil rights legislation. All aspects of federal law and policy that deal with equal opportunity for racial and ethnic minorities, women and the elderly are investigated in the following areas: (1) administration of justice; (2) education; (3) employment rights; (4) health; (5) housing; (6) language rights; (7) minority business development; and (8) political rights. The rights of institutionalized persons and the rights of the disabled are treated in two separate sections. Each report focuses on the following major issues: (1) evidence of continuing inequality; (2) the role of the Federal Government in the development of proscriptions against discrimination as they existed in 1981; (3) the efforts of the Reagan Administration to modify or change longstanding interpretations of key protection and enforcement policies; (4) the enforcement record of agencies responsible for compliance; (5) emerging policy questions; and (6) recommendations to strengthen enforcement. The report concludes that the campaigns by the Reagan Administration to repeal fundamental policies providing for broad coverage of civil rights laws and affirmative remedies by and large were unsuccessful. However, there is confusion about the federal commitment to equality of opportunity, and the elimination of effective enforcement programs has resulted in the denial of opportunity to many. The Bush Administration must reaffirm its commitment to equal opportunity, reinstate enforcement programs, and restore the public's confidence in government's adherence to existing law. A total of 2,467 endnotes divided by chapter, information about the contributors, and a list of cases dealing with the civil rights of prisoners are appended. (FMW)

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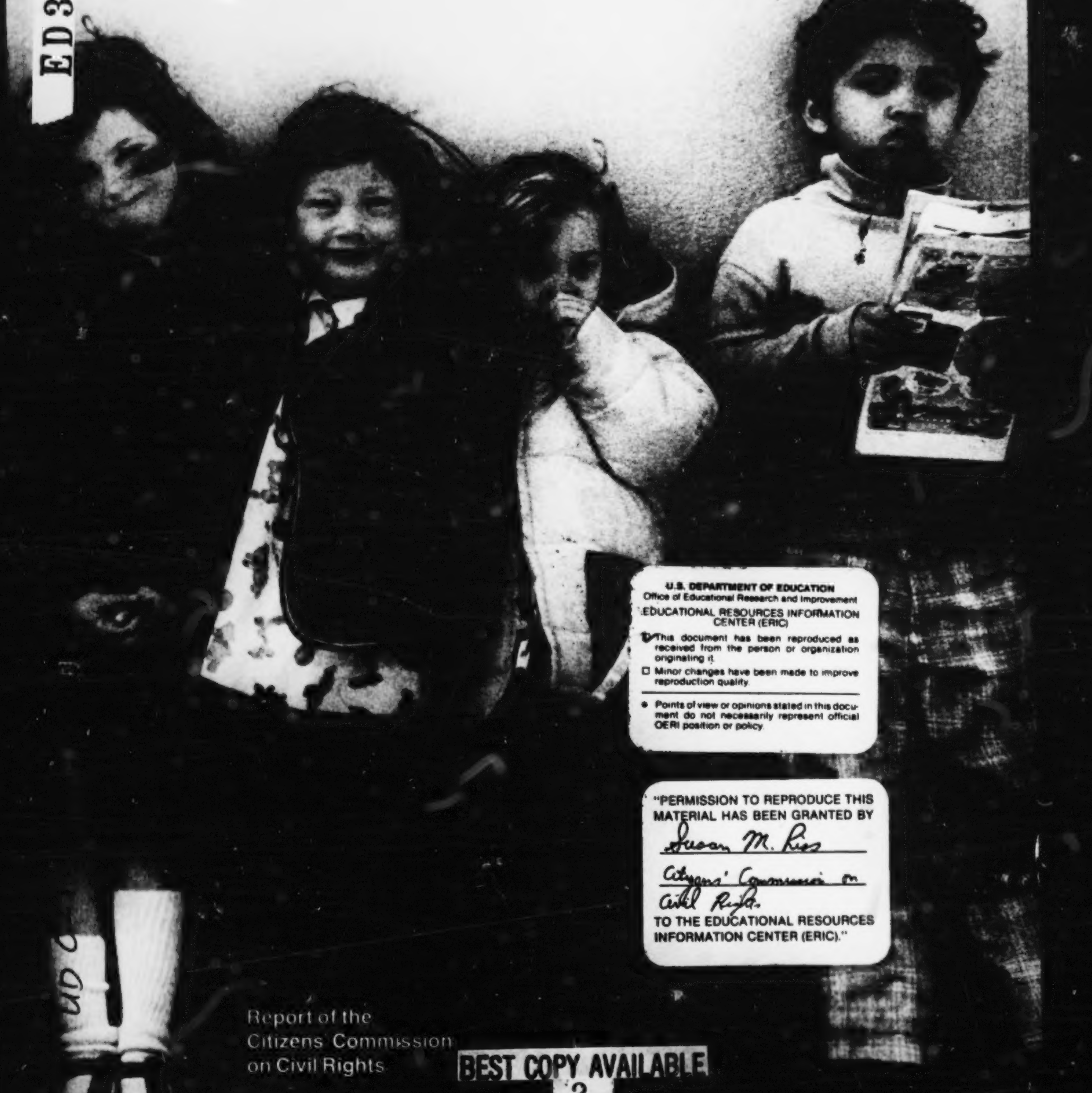
The Civil Rights Challenge for the 1990s



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Report of the
Citizens Commission
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One Nation, Indivisible:

The Civil Rights Challenge for the 1990s

One Nation, Indivisible:

The Civil Rights Challenge for the 1990s

Edited by
Reginald C. Govan
and William L. Taylor

Report of the
Citizens' Commission
on Civil Rights

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Dedicated to the memory of
Wiley A. Branton, Jr.
whose skills as a civil rights lawyer, teacher, community leader, raconteur and informal historian of the movement contributed so much to the drive for equal justice and brightened the lives of so many people.

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FOREWORD

The Citizens' Commission on Civil Rights is a bipartisan group of former officials who have served in the federal government in positions with responsibility for equal opportunity. It was established in 1982 to monitor the policies and practices of the federal government and to seek ways to accelerate progress in the area of civil rights.

The Commission gratefully acknowledges the support of the Ford Foundation for this study.

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SECTION I

REPORT OF THE CITIZENS COMMISSION ON CIVIL RIGHTS

CHAPTER I

Introduction

During the 1980s, the thrust and direction of national civil rights policy has been the subject of an ongoing debate, conducted in many forums, including the courts, the halls of Congress and executive agencies, scholarly journals, and the media.

Almost from the advent of the Reagan presidency in 1981, advocates of strong civil rights enforcement criticized the Civil Rights Division of the Department of Justice, the Equal Employment Opportunity Commission, the Departments of Education and Labor and other agencies, for failures to enforce laws guaranteeing equality of opportunity. These advocates charged the administration with ignoring or distaining statutes enacted by Congress and legal principles established by courts over many decades to implement the equality guarantee of the Fourteenth Amendment of the Constitution of the United States.

Prominent representatives of the administration, the Department of Justice and other agencies repeatedly and forcefully denied those accusations, but they readily conceded soon after taking office that they planned to make major policy changes in civil rights. Many of those officials also contended that their most ardent critics--which included some of the nation's preeminent civil rights organizations--had "lost touch" with their constituencies and that their policies had become counterproductive.

In four previous reports, published during the 1980s, the Citizens' Commission addressed some of the key issues in school desegregation, housing, affirmative action, and voting that divided the administration and its critics. As the Reagan presidency was ending, the Citizens' Commission decided to undertake a far more ambitious effort--an investigation and review not just of civil rights policy issues but of the record on enforcement. The investigation was to cover not just the most publicized issues but all aspects of federal law and policy that deal with equal opportunity for racial and ethnic minorities, women, the elderly, and disabled persons.

To assist in that investigation, the Commission invited a diverse group of experts in law and public policy--including scholars and private practitioners--to prepare policy analyses in the major area of civil rights. The response to our invitation was overwhelmingly positive. More than forty people, most of whom are occupied full-time at law firms and universities, took time to prepare papers for this report. The great majority of contributors are specialists in the area of civil rights on which they wrote papers, many having obtained their experience and expertise as civil rights professionals at the Department of Justice and other agenices.

To ensure that the analyses were a comprehensive examination of statutes, legal developments, enforcement policies, litigation goals, and the actions of federal agencies with civil rights responsibility, the experts were asked to focus on six major issues: (1) to synthesize social science or other evidence of continuing inequality due to ongoing acts of discrimination or failures to eliminate the effects of past discrimination; (2) to describe the significant decisional, statutory, and regulatory proscriptions against discrimination as they had existed in 1981, as well as the role of federal agencies in the development of those civil rights protections; (3) to identify the efforts by the Reagan administration to modify or change longstanding interpretations of key statutory protections and enforcement policies; (4) to analyze the enforcement record of agencies responsible for securing timely and effective compliance with civil rights laws. (e.g., how many compliance reviews were conducted, how were complaints investigated, and how many findings of violations, negotiated settlements, administrative enforcement proceedings, and cases were filed during the 1980s as compared to past years?); (5) to identify emerging policy questions that will need to be addressed by the new administration so that victims of discrimination will receive redress; (6) to develop specific recommendations in the form of changes or modifications to statutes, regulations, enforcement policies and the regulatory framework, to strengthen civil rights enforcement in the next administration.

Those analyses are published as a series of working papers in Part II of *One Nation, Indivisible*. The analyses demonstrate that the policies pursued during the 1980s constituted a dramatic and unforunate break with longstanding federal civil rights policies of past Republican and Democratic administrations. The good news is that due in large measure to a bipartisan consensus in the Congress for strong federal civil rights enforcement, an independent judiciary, and the efforts of underfunded private groups that have been forced to shoulder the burden of initiating civil rights enforcement actions, our nation has so far weathered the storm and is still in the position where, with strong leadership, it will be possible to move forward.

The unfortunate news is that while most civil rights policies remain intact, it will take a major rebuilding effort in the federal government to assure that the laws' protections provide tangible assistance to persons who have been denied equality of opportunity.

One Nation, Indivisible has several purposes; foremost among these is educational. Taken together, the papers are a contemporary history of continuing prejudice and discrimination against racial and ethnic minorities, women, the disabled, the elderly and of the need for vigorous federal enforcement of laws to combat such discrimination. As such, they serve to remind all of us--the citizenry, Congress, policy makers, and the media--that actions based on characteristics of race, gender, age, and disability do contribute to the significant disparities between groups in our society and that equality under law is a distant dream, not a daily reality, for millions of our fellow citizens. Illegal discriminatory practices, some blatant, many subtle, continue to flourish in our society.

The papers also serve as a reminder that the federal government has played an important, although by no means exclusive, role in dismantling the legal structure of segregation and combatting other equally pervasive forms of discrimination. During the 1960s and 1970s, although the precise level of activity varied with every Republican and Democratic administration, federal agencies charged with implementation of the civil rights laws developed techniques of enforcement that produced positive results. In contrast, during the 1980s, these methods of enforcement have fallen into disuse. Strong leadership and a commitment by federal agencies to fully enforce the laws are necessary if we are to continue achieving progress in eradicating prejudice and discrimination in the future. Should *One Nation, Indivisible* help to rekindle awareness of the need and further secure support for timely and effective implementation of federal civil rights laws and regulations, then the report would have fulfilled its educational purposes.

Another major purpose of *One Nation, Indivisible* is to serve as a resource for the President, Congress, policy planners, and civil rights advocates during the next administration. The problems faced during the 1980s will continue to occur and new ones will emerge during the administration of President George Bush. However, the policies and practices of the 1980s can and must be changed if our nation is to eradicate prejudice and discrimination. During the 1980s, problems of bureaucratic delay and inefficiency, an unwillingness to vigorously enforce some laws and regulations, and a failure to collect data on the nature and scope of discrimination caused implementation of federal civil rights policies to stagnate. By identifying areas of stagnation and new challenges and establishing a blueprint for strengthened civil rights enforcement, the Citizens' Commission on Civil Rights hopes to provide a factual base to assist the new administration in making a significant contribution to the eradication and the advancement of equal opportunity discrimination in our nation.

CHAPTER II

SUMMARY AND REVIEW

I. The Persistence of Discrimination

In the 1960s, Congress enacted civil rights laws to attack practices of segregation and discrimination imposed on blacks and other minorities that were so blatant and extreme in their consequences that they could no longer be ignored by fair-minded people. In the 1970s the civil rights laws were broadened to address conditions of inequality faced by women, older, and disabled people that were also too patent for society to continue to ignore.

As a result of the enactment of these laws, of enforcement efforts in the courts by underfunded private groups representing victims of discrimination, and of vigorous programs of enforcement by federal agencies charged with implementation of the laws, significant progress was made in the 1960s and 1970s. The legal sanctioning of racial separation in large areas of the country was dismantled. Gains were made by black citizens, Hispanic Americans, women, disabled people, and others who had suffered discrimination. Public opinion polls revealed a reduction in the stereotyping and other prejudicial attitudes that some had used as a justification for discrimination.

As later sections of this summary and the papers on which it is based reveal, during the 1980s there has been a dramatic decline in civil rights enforcement by the federal government. It is sometimes asserted and it would be comforting to believe that this decline is a product of a lessened need, i.e., a decrease in discriminatory activities that violate the civil rights laws.

But that is not the case. The papers contained in this report and other independent studies, furnish strong evidence of the persistence of discrimination. While the forms of discrimination have changed from blatant to subtle practices, discrimination continues in housing, education, employment, voting, the administration of justice, health, and many other areas.

The lagging performance of the federal government cannot fairly be attributed to lessened need, and if discrimination on the basis of race, color, national origin, sex, or disability is to be eliminated, federal enforcement must be revitalized.

A. Housing

Residential segregation remains a critical indicator of progress in the struggle for equal opportunity. When black and Hispanic citizens are isolated from majority citizens in their residences, it generally means not only a deprivation of equal housing opportunity, but, also a lack of equal access to jobs, education, and other services that are important to full participation in society.

Segregation is commonly measured for a particular community on a 100-point scale with 100 denoting total segregation (i.e., all blacks and whites living in racially homogeneous areas) and zero indicating complete residential desegregation. Using this measure, the overall segregation index in 1980 was 77 for the nation's largest 17 metropolitan areas (those with more than 250,000 blacks).

This represented a drop of only 5 points from the 1970 index in these 17 areas. In the nation's most segregated cities such as Chicago, Cleveland, and Detroit, the index remained near 90, indicating acute racial isolation. Even in the less segregated metropolitan areas such as San Francisco and Washington, D.C., the 1980 index was approximately 70. Although no new comprehensive figures will be available until after the 1990 Census, all indications are that the patterns of segregation revealed in the 1980 Census continued in the 1980s.

The overall residential segregation index for Hispanic citizens was 48 in 1970, indicating a problem less severe than that faced by blacks. But with the recent growth in the Hispanic population, the problem may be worsening and a number of studies suggest that dark-skinned Hispanics face levels of housing segregation comparable to those experienced by blacks.

There is strong evidence that racial discriminationis a major factor in the persistence of these patterns of segregation. One major indicator is what happens to blacks in urban areas when they seek to purchase or rent a home in areas that are predominantly white. In the late 1970s, a major study covering 40 metropolitan areas concluded that a black homeseeker who visits four real estate agents will encounter at least one instance of discrimination 72 percent of the time for rentals and 48 percent of the time for sales. Later regional studies from Boston, Denver, and the Washington, D.C. areas showed similarly high levels of discrimination persisting into the 1980s. In 1985, the Department of Housing and Urban Development estimated that 2,000,000 instances of housing discrimination were still occurring every year.

A second major indicator is the persistence in major cities throughout the nation of practices of redlining--refusals by lending institutions to make mortgage loans in areas inhabited by minorities. Recent studies conducted by major metropolitan newspapers in Detroit and Atlanta found significant disproportionate lending patterns by banks and thrift institutions. In Detroit, mortgage loans are made to white middle-class applicants at three times the rate of loans to black applicants that are similar in economic status. The gap is even larger in Atlanta. Studies of lending practices in New York City, Washington, D.C., Philadelphia, PA, Chicago, IL, Milwaukee, WI, Denver, CO, and Toledo, OH confirm an epidemic of discriminatory home mortgage lending practices which has gone virtually unchecked by the federal government.

These disinvestment practices help account not only for racial segregation but continued racial disparities in home ownership and in occupancy of substandard housing.

In sum, none of the major trends in housing over the past two decades have served to counter the observation of the National Advisory Commission on Civil Disorders in 1968 that the nation was "moving toward two societies, one black, one white--separate and unequal."

B. Elementary and Secondary Education

1. Race

The patterns of extreme racial isolation that persist in housing are mirrored to a degree by racial segregation in public schools. According to a 20-year study of racial segregation in large school districts, published by the National School Boards Association, black students are usually highly segregated from whites. Almost two-thirds of all minority students are enrolled in predominantly minority schools, and more than 17 percent attend classes in which over 99 percent are minority students. The percentage of black students in public schools that were predominantly minority declined from 75 percent to 66 percent and the percent of students in schools that were more than 90 percent minority dropped from 60 percent to 33 percent. However, the great bulk of that progress was accomplished in the South in the early 1970s as a result of court orders calling for comprehensive remedies. Little progress has occurred in the North since the late 1970s. Where gains have been made, they have been confined largely to districts (e.g., Cincinnati and Columbus, OH, San Francisco, CA, Buffalo, NY, and Denver, CO) where private groups have brought successful law suits.

The problems of racial isolation are dominant in the largest urban areas of the nation. The 25 largest central city districts in 1986 enrolled 27.5 percent of the nation's black students but only 3.3 percent of the nation's white students. Many of these central cities are surrounded by suburban school districts which are predominantly white in their enrollment. Desegregation of large urban areas has been accomplished only in a relatively few districts (e.g., Charlotte-Mecklenburg, NC and Tampa-Hillsborough, FL) that are organized along metropolitan or urban county lines and in a handful of other districts (Wilmington, DE, Indianapolis, IN, Louisville, KY, St. Louis, MO) where courts have ordered or encouraged interdistrict desegregation.

In these segregated schools and school districts, black and Hispanic children often are faced with unequal educational resources; e.g., less experienced teachers, outdated materials, an absence of counselors. Minority children are twice as likely to drop out of school as white children, and disproportionate numbers of minority children leave school functionally illiterate and thus unprepared for the world of work.

2. *Language Minorities*

Hispanic students, like black students, tend to be concentrated in the largest urban school districts in the nation. In 1986, 30 percent of all Hispanic students were enrolled in the 25 largest districts in the nation.

While the degree of isolation for Hispanic students in these systems has not reached the extreme level faced by black students, it is moving rapidly in that direction in all parts of the country.

In Los Angeles, the most populous Hispanic district in the nation, schools that are predominantly Hispanic in student enrollment often are the most crowded, have the least experienced teachers, and are faced with other inequalities and inadequacies of resources. In many school districts across the nation, the dropout and failure rates for Hispanic students approach 50 percent.

At the same time, as early as 1982, then Secretary of Education, Terell Bell, concluded that schools in general were not assessing or meeting the needs of Hispanic and other students whose proficiency in English was limited.

According to a study published by the Education Testing Service, despite lagging reading and academic performance, more than two-thirds of all the minority students assessed, both Hispanic and non-Hispanic, were receiving neither bilingual or English as a Second Language services.

C. Higher Education

1. *Race and National Origin*

In the years after enactment of the civil rights laws, access for minorities--particularly black students--to higher education increased significantly. In recent years, however, progress has come to a halt and there are signs of regression.

Between 1976 and 1985 there was a one-fourth decline in the rate of college entry by minority high school graduates. In 1981, the proportion of black high school graduates 18-24 years old, who were enrolled in college, was 28 percent and for Hispanics it was 29.8 percent. By 1985, the rates for both groups had declined to 26 percent compared to 34 percent for whites--a disparity not significantly different from that of a decade earlier.

Moreover, minorities are disproportionately concentrated in two-year junior and community colleges. This helps account for the strikingly disproportionate rates of graduation from four-year colleges and universities. Among 1980 high school seniors, whites earned college degrees at a rate of 20.2 percent, blacks at 10 percent, and Hispanics at 6.8 percent.

2. *Sex*

The problem for women, is not under-enrollment; women now constitute more than one-half of all students enrolled in post-secondary education. However, this equality is in many ways superficial. Problems faced by women in higher education include: continuing and pronounced sex segregation in fields of concentration and specialization; employment discrimination including sexual harassment; lower levels of financial aid; wide-spread discrimination in athletic programs; lack of health coverage for pregnancy; limited childcare services; and the disturbing incidence of date rape.

At the community and junior college level, women are heavily enrolled in the traditionally female and low-wage areas of health services, nursing, and secretarial programs, while males predominate in technical and mechanical programs leading to far more remunerative jobs. In undergraduate and graduate education women remain underrepresented in scientific and technical programs. In 1985-86, only one-third of students in physical science and computer programs, and less than one-sixth of engineering students were women.

D. Employment

1. *Race and National Origin*

Perhaps the most telling indications of the persistence of unequal opportunity are the disparities that continue to exist in income, employment, and economic status between white and minority families and workers.

A decade ago, 30.6 percent of all blacks and 8.7 percent of all whites in the United States were poor. In 1987, 33.1 percent of blacks and 10.5 percent of whites were poor. Poverty had risen and the gap between whites and blacks, if anything, had widened. Moreover, according to a recent study by Center on Budget and Policy Priorities, the poverty rate among black children was 45.6 percent in 1987 or 4.4 million children, a higher rate than in any year since the mid-1960s. For Hispanics the poverty rate in 1987 was 28.2 percent.

As for income, the median income for black families in 1987 was $18,098, a drop of almost one thousand dollars from the median for black families in 1978. For white families, the median was $32,274 in 1987, a slight gain from the $31,988 median in 1978. The median income in 1987 for Hispanic families was $20,310, slightly above that of blacks.

In 1987, 13 percent of blacks in the work place were unemployed compared to 5.3 percent of white workers, a continuation and worsening of the more than 2:1 ratio that has persisted through good economic times and bad over the past four decades. For Hispanic workers the unemployment rate was 8.8 percent in 1987.

Although some gains in occupational mobility have occurred since the 1960s, black workers are still far less likely than their white counterparts to be in managerial, professional, technical, and sales occupations. They are more likely to be laborers, service workers, and operatives. Hispanic workers, too, are underrepresented in managerial and professional jobs and overrepresented among operators, fabricators, and laborers.

Certainly, the causes of these continuing economic disparities are complex. The importance of access to higher education may be gauged from the fact that among blacks with some college education, the poverty rate in 1987 was 11.2 percent, only a third of the overall rate for blacks (although still higher than the overall rate for whites). Among the factors that account for economic disparities, however, discrimination in the job market still plays an important role. One clear indication of this is the continuing volume of successful civil rights litigation.

In the 1980s, private suits were successfully concluded to end systemic practices of discrimination by major corporations in the insurance, transportation, pharmaceutical, and textile industries. At the same time, agencies of the federal government have been called to account for discriminatory practices. Since 1972, approximately 20 class actions and a host of individual cases have resulted in decrees or settlements affording substantial relief to victims of discrimination in agencies including the Departments of State, Energy, and Labor, the Federal Trade, Maritime Commissions, NASA, the General Accounting Office, and the Government Printing Office.

Approximately $40 million in backpay has been awarded during this period to victims of race and gender discrimination. Most recently, an internal report by the Navy identified widespread but subtle discrimination against minority sailors including practices such as channeling intonon-technical areas where opportunities for promotion are fewer, lower overall evaluations, and failure to direct recruiting advertising to minority areas.

There is also substantial evidence that employers have adopted practices that create insurmountable discriminatory barriers for foreign-born or foreign-looking workers seeking a job in response to Congress's decision in 1986 to make it unlawful for employers to hire or employ undocumented aliens. Two recent studies, one performed by the New York State Inter-Agency Task Force on Immigration Affairs established by Governor Cuomo, and the other performed by the General Accounting Office, confirm that employers generally are unaware of what documents they need to require of applicants and of the grace period after the employee is hired to establish their immigration status. Consequently, some employers have adopted the unlawful practice of asking only foreign-looking or foreign-sounding persons for employment verification. Other employers refuse to hire applicants until documents they deem satisfactory are presented by the applicant, thereby resulting in delayed employment or no employment at all.

2. *Sex*

Disparities for women in the workplace are not unlike those that affect blacks and Hispanics. In 1986, 61 percent of all persons aged 16 and over who had incomes below the poverty level were women. The proportion of poor families maintained by women alone was 51 percent. Currently, the earnings of women are only 65 percent of comparable male earnings. In large part this gap reflects the continued segregation of women in low-paying occupations that are reserved largely for females. So, while women made gains during the 1970s and 1980s in a few of the more remunerative professions such as law, the great majority remained clustered in traditional jobs such as clerical, services, and health work, and as elementary and secondary school teachers. Black and Hispanic women tend to hold the lowest-paying-traditionally female jobs--such as domestics, child care workers, nurses aides, food counter workers, and machine workers. Unlawful discrimination continues to lock women into such jobs. For example, in 1985 a court found that State Farm Insurance had discriminated against women in hiring trainee agents, an entry-level sales position, at least since 1974. The estimated potential back-pay award is $500 million.

3. *Age*

Age bias in the workplace continues to mushroom. Charges of age discrimination filed with federal and state authorities has grown 250 percent from 11,706 in 1980 to 25,549 in 1987.

Age bias persists through the prevalence of false stereotypes which tie diminishing skills to increased age, and which preclude business judgments based on an individual's ability. It also persists through recent economic trends which affect older workers most drastically. Mergers, downsizing and layoffs are sweeping through industry, and their most vulnerable targets are senior employees with higher salaries than their younger counterparts.

In a recent four year period, one million workers over 55 lost their jobs, over half from a job they had held for more than 15 years. Among the same one million older workers, less than half became reemployed.

Over $26 million in back pay and related benefits was awarded to victims of age discrimination during 1987.

E. Health Care

Equal opportunity in the area of health care remains an elusive goal. Health status is closely related to economic status, but it is a mistake to treat problems of access to health care as solely matters of wealth. Without a strong civil rights enforcement component, too many of the present disparities will continue to exist. For example, even accounting for employment status and income, minority families are less likely to have employer-provided health insurance coverage and are more likely to be completely uninsured. In 1986 when 17 percent of all white children in employed families were uninsured, more than one-quarter of all black children in such families were uninsured. Less than half of all black children in employed families, compared to 70 percent of white children in employed families, had employer provided insurance coverage.

Public health statistics also bear out the relationship between race and health status. Up until 1980-81 the United States made considerable progress in reducing infant mortality, reducing the number of low-birth weight babies, and expanding access to prenatal care. But progress was halted and in 1983 the gap between black and white infant mortality rates reached its widest point since 1940. Black babies are now twice as likely to die within the first year of life as white babies.

Among industrialized nations, alarmingly high rates of infant mortality are a direct product of the fact that 68 percent of all babies were born to women whose prenatal care could be considered minimally adequate, and only 57 percent of black babies received minimally adequate prenatal care.

Such disparities do not improve after birth. The proportion of non-white infants who received *no* doses of polio vaccine increased by 20 percent between 1980 and 1985. In 1984, one-sixth of all inner-city urban children were victims of lead toxicity, an incidence rate disproportionately affecting minority children. Fifteen percent of all children under 15 years old are black, but 53 percent of all pediatric AIDS cases are among blacks.

Moreover, the mere availability of Medicaid coverage does not guarantee access to health care. Medicaid, the largest federal public health financing programs for persons who are neither elderly nor disabled adults, reached only 40 percent of the poor in 1986. Black Medicaid recipients over the age of 65, in most states, received only half the services per capita received by white Medicaid recipients over the age of 65.

Persons with disabilities face problems in gaining access to quality health care similar to those experienced by minority persons. Many health insurers discriminate against persons with disabilities in the issuance of policies. That factor together with the increased likelihood that persons with disabilities will be unemployed, means that such persons are disproportionately dependent on public health programs that were cut back during the past eight years. Even with public or private health insurance, many barriers to access still exist. Some health providers are inaccessible to persons using wheelchairs. Most providers are unable to effectively communicate with persons with vision or hearing impairments.

Thus, realizing a commitment to equal opportunity in the area of health care will require a strong civil rights enforcement program.

F. Persons with Disabilities

For the more than 35 million Americans who have disabilities, the barriers to equal participation are multiple and often extreme.

In housing, for example, practices are prevalent denying disabled persons access to private housing units. In some cases, there are structural barriers; in others, the rental policies and practices of landlords are discriminatory. Even in public housing, there has been little effort to accommodate the needs of disabled people. In some cases, public housing units have been made accessible to single people who are disabled but not to families. The District of Columbia, for example, does not have any units accessible to a disabled family.

Access to transportation is a prerequisite for achieving equal opportunity and independent living for approximately 7.4 million persons who have disabilities that impair their motor skills. But, according to a 1982 study, conducted by the General Accounting Office, nearly three-fourths of the urban rail stations surveyed are almost totally inaccessible to wheelchair users. The same study determined that one third of the transit systems offering fixed-route bus service did not have a single bus with a lift. A 1985 American Public Transit Association (APTA) fact sheet reported that 76 percent of the 49,000 buses then in use in this country were not accessible to disabled persons.

In employment, both public and private, disabled persons continued to be barred from job opportunities for reasons that have nothing to do with their ability to perform the work. Substantial evidence exists that the federal government has failed to fulfill its statutory obligation to be a "model employer" of persons with "targeted disabilities." While the Reagan administration has tacitly recommended that persons with "targeted disabilities" should constitute 5.9 percent of the total number of persons employed by the federal agencies, such persons continue to be under-represented in the federal work force. Between 1981 and 1987, employment of persons with "targeted disabilities" rose from .80 percent to only 1.09 percent of the federal work force. The Department of Justice had one of the worst records of any federal agency.

Perhaps the most severe test of the nation's will to overcome discrimination lies in the treatment of people with AIDS or who carry the AIDS virus (HIV). Such individuals have been fired from their jobs, evicted from their apartments, precluded from entering airplanes, restaurants, and other places of public accommodations, and denied health care services by doctors and dentists. Children with AIDS or HIV have been ordered by school boards or administrators not to attend their public schools.

While AIDS poses a health problem of great magnitude, it also poses a challenge for those who believe in fair enforcement of the civil rights laws.

G. Voting

Largely a result of vigorous enforcement of the Voting Rights Act since 1965, there has been a dramatic increase in the number of minorities elected to public office. However, although blacks constitute 11 percent of the population, black elected officials make up only 1.5 percent of elected public officials nationwide. Structural barriers to voting continue to have a substantial adverse impact on minority representation at every level of government. These include racial gerrymandering of election district lines, the discriminatory use of multi-member districts, at-large elections, and municipal annexations.

It is clear, in addition, that restrictions on time and place for registration impede participation by minorities, the poor, and other discrete groups in the electoral process. During the 1984 elections, for example, of the U.S. voting age population, whites voted at a rate of 61.4 percent, while blacks voted at 55.8 percent and Hispanics voted at 32.6 percent. Registration appears to be a key issue. Limited sites and hours for registration adversely affect large numbers of minorities and poor who do not own automobiles, or cannot leave their jobs during the normal work day. Many of these discriminatory barriers are identified in our recent report, ***Barriers to Registration and Voting: An Agenda For Reform.***

II. Lack of Meaningful Civil Rights Enforcement Programs

It is in the context of the conditions of inequality described previously that the current state of federal civil rights enforcement must be assessed. During the 1960s and 1970s, federal agencies charged with implementation of the civil rights laws developed techniques of enforcement that produced positive results: efficient complaint processing, self-initiated investigation of patterns of discrimination, settlement agreements that obligated parties to achieve clear and specific results, vigorous programs of trial and appellate litigation, and active use of sanctions, including fund withdrawal from federal grantees and debarment of contractors who violate the law. During the 1980s, despite evidence of illegal discriminatory practices, such methods of enforcement fell into disuse.

A. Decline in Litigation

One important measure of the vigor with which laws are enforced is the volume of trial and appellate litigation pursued by federal agencies. Agencies exercise active and visible leadership in development and enforcement of civil rights protections by filing and litigating cases. Professor Robert Schwemm has noted, "[S]urely the recognition that the government may sue to aggressively protect rights of victims of discrimination leads not only to more litigation but also to more effective non-litigation strategies and more voluntary compliance. As important as non-litigation strategies are, they require at least the threat of effective litigation to back them." When measured against that criterion, it is clear that during the 1980s federal agencies virtually abandoned trial and appellate litigation as a tool to enforce most civil rights laws.

For example, in the area of prison reform litigation, the Ford administration participated as *amicus*, or intervenor, in 20 new cases in 1975. During the first year of the Carter administration, 11 new cases were initiated and the Justice Department intervened in three others. In contrast, no new cases were initiated during the first fifteen months of the Reagan administration. In the subsequent 69 months, only 28 new investigations were initiated, only five cases were settled pursuant to consent decrees, and not a single one was litigated to resolution.

In the area of elementary and secondary education, only four new cases have been filed since 1981, and one of those cases was filed at the request of the school district to memorialize in the form of a consent decree an earlier settlement agreement that had been reached with the Department of Education.

In fair housing, since 1981, an average of 10 new cases per year have been filed. If one considers only the period from 1984-1987, the average number of cases filed per year increases to 16. Nevertheless, those averages are equal to 31 percent and 50 percent of the 32 cases per year filed between 1969 and 1978. And, of the four appellate decisions in housing cases reported since 1980, three of those are from cases filed during the Carter administration.

In the area of voting rights, since 1981 the Department of Justice filed only 31 cases to challenge discriminatory voting practices and only 15 cases to enforce the pre-clearance requirements of the Voting Rights Act. That means that each of the 27 attorneys in the voting section of the Civil Rights Division has handled an average of 1.7 substantive cases since 1981.

Not until April 1984, did the administration file its first case to challenge seriously inadequate and (sometimes dangerous) conditions that exist in institutions dealing with mental health and retardation. More recent statistics show that of the eleven mental disability cases filed, eight were cases settled by consent decree filed contemporaneously with the complaints. The Civil Rights Division is not actively litigating any contested mental disability case and never had more than three such cases on its docket at any time.

The Equal Employment Opportunity Commission (EEOC) also dismantled its program of vigorous trial and appellate litigation. For example, there was a 70 percent decline in the number of cases the EEOC filed between 1981 and 1982. By 1985, the Commission had filed 22 percent fewer cases in court than were filed in 1981. In addition, the Commission's filing of *amicus* briefs declined from 89 in 1979 to 16 in 1985.

By 1985, the Equal Employment Opportunity Commission deemphasized prosecution of cases challenging systemic patterns and practices of discrimination which give relief to large numbers of victims in favor of cases on behalf of individuals. The new policy clearly restricted the effectiveness of litigation as a weapon to ensure equal employment opportunity. Consistent with that policy, litigation challenging race- and sex-based pattern and practice cases against private employers also was virtually abandoned as an enforcement tool. There has been a 30 percent drop in cases challenging systemic age discrimination between 1986 and 1987.

By eschewing litigation as a primary tool to enforce civil rights, federal departments and agencies abandoned their historic leadership in the development of civil rights laws and ensured that enforcement programs had little positive impact beyond eliminating the handful of discriminatory acts they chose to pursue.

In many instances, victims of discrimination were forced to bear the burden of enforcement when the Civil Rights Division refused to file lawsuits to protect important civil rights. For example, although responsible for protecting the rights of institutionalized disabled persons, the Department's leaders vetoed requests by staff to investigate conditions at Hisson Memorial Center, a mental retardation center in Oklahoma, on grounds that the proposed investigation did not reveal conditions that justified litigation. Subsequently, residents of the center sued and in July 1987 won a significant court victory. The Department also refused to intervene in litigation which uncovered substantial evidence of abusive conditions at the Gratton State School in North Dakota.

In voting rights, the Civil Rights Division vetoed staff recommendations to file lawsuits to challenge discriminatory county redistricting plans in Mississippi. Ultimately, victims of discrimination filed approximately 30 cases which successfully challenged these redistricting plans.

In the case of elementary and secondary education, underfunded private civil rights groups have brought several school desegregation cases in large urban areas and have won metropolitan-wide desegregation remedies. The Civil Rights Division has never filed an interdistrict case and since 1981 has not participated as a friend of the court in seeking these remedies. In early 1981 the Civil Rights Division was prepared to file such a case against districts in the St. Louis metropolitan area. Yet, it failed to do so, and then actually opposed a plan of voluntary student transfers between the city and suburban school districts which the victims of discrimination and twenty-three school districts had agreed to in settlement of the case.

Nor has the Division sought to build on its success in the Yonkers, New York case by investigating and challenging, in a single suit, discriminatory housing and education practices which create residential and school segregation.

B. Decline in Relief

A decline in the volume of cases filed by the government might not indicate a weakening of enforcement if useful redress was being obtained through conciliation and settlement. However, an analysis of the relief obtained by federal enforcement agencies in significant cases demonstrates that their policies of conciliation and negotiation have not been adequate to remedy denials of civil rights.

In *U.S. v. Michigan*, a prisoners' rights case, the head of the Civil Rights Division rejected a 54-page settlement agreement that had been agreed to between his attorneys and the State of Michigan. Instead he adopted a five-page decree that proposed to incorporate the more detailed original agreement as a voluntary state plan. The Federal District Court rejected the proposed decree as insufficient to remedy the unconstitutional conditions of confinement. The State of Michigan responded by drafting a new proposed decree that made the "state plan" enforceable. The Civil Rights Division again refused to accept that decree and instead proposed an eight-page decree that once again made the "state plan" voluntary. Again, the revised decree was rejected by the Federal District Court. Ultimately, the Department acceded to the Court's mandate that the entire plan be enforceable.

In an Alabama case, *Wyatt v. Ireland*, the Department also agreed to a proposed settlement with the defendants which, had it been adopted, would have terminated court orders protecting the rights of institutionalized disabled persons, notwithstanding the defendant's ten years of non-compliance with those orders.

Similar defects are apparent in settlement agreements entered into by the Civil Rights Division in the area of public school desegregation. Despite the fact that the cases are founded on allegations that segregation was mandatorily imposed, the settlements rely solely on desegregation achieved through voluntarism. The decrees do not provide for any specified level of desegregation or any mandatory backup mechanisms if voluntary methods failed to achieve desegregation. In a case arising in Hattiesburg, Mississippi, where a victim of discrimination who was a party to the case objected to a proposed consent decree between the Civil Rights Division and the school district, a federal appellate court specifically rejected the decree as inadequate.

In addition, the settlements entered into by the Division are substantially weaker than decrees which school districts have been willing to agree to in cases brought by victims of segregation. For example, in 1983, the Division settled the *Bakersfield, California* case, with an agreement that simply required a "good faith effort" by the district to desegregate. Although a federal agency had found that Bakersfield had committed pervasive intentionally segregative acts, the settlement did not require the district to achieve any specified level of desegregation or provide for an effective method of enforcement should such good faith efforts prove to be inadequate to achieve desegregation.

Shortly after the *Bakersfield* settlement, private plaintiffs representing black school children in Cincinnati, Ohio, agreed to a settlement in which the school district was required to achieve a specified level of desegregation through methods of its own choosing and to a mechanism to enforce that obligation. School districts in other cities have settled school desegregation cases and provided substantially more relief than the federal government has been willing to accept.

Nor have the Division's recent efforts in the area of fair housing litigation yielded much fruit. Thirty-five consent decrees were entered into between January 1981 and June 1985. Common to all those 35 consent decrees was a requirement that property owners send letters--described as "palliatives" by one Senator--to the persons discriminated against inviting them to reapply for housing with no assurance that apartments sought would be rented to them.

In the area of equal employment, both the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance report significant declines in the amount and number of recipients receiving back pay to remedy discrimination. At the OFCCP, the number of recipients receiving back pay dropped from 4,336 in 1980 to 211 in the first half of 1985.

A similar pattern is present at the EEOC where the number of complaints receiving monetary relief dropped from 15,328 in 1980 to 2,964 in the first half of 1985. In addition, the no cause rate--a determination that a complaint is without merit--has doubled, from less than 30 percent in 1980 to almost 60 percent in 1987.

C. Inefficiency and Delay in Complaint Processing

One ingredient of a successful enforcement program is processing complaints of discrimination in an efficient manner. Many federal enforcement agencies, including the Equal Employment Opportunity Commission, the Office of Civil Rights of the Department of Education and the Department of Housing and Urban Development, have been given by Congress important responsibilities to investigate and resolve complaints filed by individual victims of discrimination. During the 1970s, management systems were imposed on, or adopted by, agencies to ensure the discharge of those responsibilities in a thorough and timely manner. During the 1980s, those management programs were dismantled and not replaced by programs which effectively resolved complaints. As a result, victims of discrimination did not receive redress.

The most glaring failures of enforcement occurred at the EEOC which has primary responsibility for investigating complaints that allege violations of laws barring discrimination in employment. Of the more than 100,000 employment discrimination complaints filed per year, the EEOC ordinarily retains approximately 60 percent and delegates to state and local agencies for investigation the other 40 percent. In the 1970s, the Commission adopted a management system to expedite the resolution of complaints.

The system helped reduce the backlog of complaints from 126,000 in 1975 to 55,000 in 1980 to 31,000 in 1983, when the Rapid Charge Process was dismantled in favor of a policy of "full investigation" of all complaints. As a result, the backlog of complaints doubled to approximately 62,000 since 1984 despite the fact that between 41 percent and 82 percent of the complaints are not fully investigated in compliance with the new policy.

The EEOC's abandonment of programs to resolve complaints early in the investigating process has had serious consequences for victims of discrimination. For example, over 7,500 age-discrimination complaints were not resolved before the expiration of a two-year statute of limitations, leaving complainants without a remedy until Congress intervened and passed legislation to extend the limitation period.

Nor has the Commission fulfilled its duty to ensure that state and local agencies, to which it refers complaints efficiently investigates them. In a recent report by the General Accounting Office, the Chairman of the EEOC acknowledged that the Commission has not monitored the state and local agencies properly.

The Department of Housing and Urban Development has significant responsibilities for processing complaints alleging violations of fair housing laws. Although analyzing HUD data is difficult because almost every annual report presents different information in a different format, it appears that growth in the number of complaints filed from 1979 to 1982 stopped and thereafter leveled off. So, despite HUD estimates that 2 million instances of discrimination occurred each year, the agency receives fewer than 5,000 complaints. HUD efforts to increase the number of privately initiated complaints through public information and outreach have been minimal and ineffective.

This paucity of complaints may also reflect a lack of confidence in HUD's ability to provide remedies. In 1987, the total monetary relief obtained for HUD complainants was only marginally higher than the 1982 figure, despite the fact that damage awards in private fair housing litigation accelerated significantly.

HUD also relies on state and local agencies to investigate complaints when state and local fair housing laws are deemed by HUD to be "substantially equivalent" to federal fair housing laws. From 1980 to 1988 the number of state and local agencies certified by HUD grew from 38 to 112. Partially in response to concerns about the integrity of HUD's certification process, Congress in the Fair Housing Amendments Act of 1988 specified factors to guide HUD's decisions on certification and required all agencies to be recertified.

Inefficient complaint processing also plagues the Office of Civil Rights of the Department of Education. Although the number of complaints filed has declined during the 1980s, a House Subcommittee in 1987 found a "nationwide scheme" to backdate documents and persuade victims to drop complaints. The purpose was to make it appear that the Office was meeting court mandated timeframes for processing complaints. Despite its backlog of complaints, the Office of Civil Rights failed to expend approximately $20 million appropriated to it from 1980 to 1985 which could have been used to reduce its backlog.

At the Department of Health and Human Services complaints by citizens that they have suffered discrimination in federally-supported health services languish uninvestigated and unresolved. According to a 1987 Report of the House Committee on Government Operations, 61 complaints and self-initiated compliance reviews had been referred to the Department's Office of Civil Rights between 1981 and 1986. Of the 61 cases, 50 were more than one year old, 30 were more than two years old, 16 had been filed more than three years earlier, 10 were more than four years old, and three had been in OCR for more than five and as long as seven years.

Another practice of both the Departments of Education and Health and Human Services that has weakened enforcement of civil rights laws is the abandonment of letters of findings which specify the violations that will be corrected as part of the settlement of a complaint. Instead, the agencies issue letters giving violators a clean bill of health based only on general promises that performance would improve in the future. In 1981, the Office of Civil Rights of HHS issued 85 letters of findings of violations of civil rights laws. By 1985, the number of such findings had fallen to three; many of the other complaints were closed despite the fact that violations of law had not been remedied.

In the case of voting rights, federal law gives the Department of Justice the power to investigate and to prevent implementation of voting law changes in states with a history of discrimination if the Department finds the change will dilute the votes of minorities. In numerous instances in the 1980s the Department failed to object to changes which were subsequently challenged by private plaintiffs and struck down as racially discriminatory. In other cases the Department has approved voting law changes administratively and only afterward filed a lawsuit challenging the same changes as racially discriminatory.

In sum, in all of the major agencies responsible for civil rights enforcement, complaints have been handled badly during the 1980s. Civil rights experts say that processing complaints is not the most effective instrument of law enforcement because it deals on a retail basis with problems that may be systemic. For the individual who has suffered discrimination, however, the government's responsiveness to a complaint may be crucial, for it may be the only realistic opportunity to redress a wrong that has a deleterious impact on the complainant's life. When there is a failure to respond, the complainant's confidence in government may be shaken. That has happened all too often in the 1980s.

D. Agency-Initiated Investigations of Patterns of Discrimination

One of the most efficient techniques of civil rights enforcement has been agency-initiated investigations of systemic patterns of discrimination. Often, only federal agencies have sufficient resources and expertise to investigate a large entity's compliance with the civil rights laws. Despite the commitment of resources necessary to investigate patterns of discrimination, it is generally acknowledged that such investigations are worth the investment.

Elimination of patterns of discrimination provide redress to a greater number of people than the successful resolution of individual complaints. During the 1980s, however, agencies either cut back on the number of self-initiated investigations or failed to initiate such investigations when confronted with evidence of discriminatory practices by entities they regulate.

In the area of bilingual education, the Office of Civil Rights conducted 600 compliance reviews in 573 school districts from 1975 to 1980. In the period from 1981 to 1986, OCR conducted only 95 reviews in 66 school districts even though violations of civil rights laws were found in 58 percent of the cases. School districts were nine times less likely to be subjects of a compliance review in the Reagan administration than in past years. Instead of a program of vigorous enforcement, the centerpiece of OCR's effort was to invite approximately 500 school districts which had implemented detailed equal opportunity plans to enter into negotiations designed to relax their obligations. After five months, only 14 school districts accepted the invitation by proposing modifications to their plans.

At the same time OCR was also curtailing its investigations of sex-based discrimination in elementary and secondary schools and at institutions of higher education. Between 1981 and July 1985, OCR referred only 24 cases of sex discrimination in higher education for enforcement to the Justice Department. The cases languished at the Justice Department.

In deciding which school districts to review for civil rights compliance, OCR had previously relied on its semiannual civil rights survey of school districts begun in 1968. From 1978 to 1982, surveys were conducted so that all districts with enrollments over 300 were surveyed comprehensively at least once during a six-year cycle and with districts of high interest surveyed once every two years. In 1984 OCR abandoned that survey strategy in favor of a random sampling of districts, thereby making it difficult to effectively identify districts for investigation, particularly those that warrant special attention.

Other agencies also failed to initiate vigorous investigations of systemic discrimination, including the Office of Federal Contract Compliance, four bank regulatory agencies, and the Federal Communications Commission.

The Office of Federal Contract Compliance Programs (OFCCP) has primary responsibility for enforcement of equal opportunity by federal contractors. According to a staff report of the House Education and Labor Committee, OFCCP cases referred to the Solicitor of Labor for enforcement declined from 269 cases in 1980 to 22 cases in 1986. Another report by the Inspector General of the Department of Labor, in September, 1988, concluded that the OFCCP failed to target for investigation contractors who had the highest likelihood of noncompliance and rarely evaluated contractors who did not comply with federal reporting requirements. That report also concluded that enforcement efforts have been so untimely that cases are closed without any action taken to remedy major violations.

Nor has the Federal Communications Commission adopted adequate mechanisms to ensure equal employment opportunity for women and minorities in the broadcast industry. Although the Commission requires annual reports of hiring and promotion practices, it relies on private parties to file objections or complaints about licensees' employment records. Moreover, the Commission reviews a licensee's record as a part of the license renewal procedure once every four or seven years. Each of the four license renewals that went to hearings on equal opportunity issues since 1981 were triggered by objections filed by private groups. In contrast, federal law requires the Commission to certify annually a cable operator's compliance with equal opportunity provisions. In 1986, the Commission denied compliance certificates to more than 90 cable units and admonished another 341 units to improve their equal employment efforts.

Federal bank regulatory agencies have failed to initiate effective investigations to combat the pervasive problem of redlining in violation of community reinvestment laws. In addition, most bank regulatory agencies have substantially curtailed their efforts to enforce the civil rights laws. For example, the combined man hours devoted to reviewing compliance on "consumer" issues which include civil rights fell from 808,335 in 1981 to only 209,881 in 1984, a decline of 74 percent. In hearings before the Senate Committee on Banking in March 1988, representatives of bank regulatory agencies acknowledged shifting resources from monitoring compliance with civil rights to other issues. For those and other reasons, bank regulatory agencies have found few banks in violation of community reinvestment laws. For example, since 1977, federal regulatory agencies have denied only eight out of 40,000 applications by banks to expand their service areas because of violations of community reinvestment laws.

E. Abdication of Policymaking Responsibilities

In areas where neither Congress nor the courts have taken definitive action to define civil rights duties or give content to remedies, it is the responsibility of the federal agency that administers the law to do so through promulgating regulations or policy directives.

Some of the most important work of civil rights agencies is accomplished through this process. In the 1960s, the Department of Health, Education and Welfare shaped the future of school desegregation remedies through guidelines on "freedom of choice" plans that were ultimately adopted in substance by the Supreme Court. The Equal Employment Opportunity Commission adopted guidelines governing employee selection that become the basis for invalidating tests and other devices that had an adverse impact on minorities and that were not needed by business.

Along with these positive initiatives were examples of agency abdication or neglect. For almost a dozen years after passage of the Civil Rights Act of 1968, the Department of Housing and Urban Development failed to issue fair housing regulations.

During the 1980s the failures were compounded. One of the first acts of the Reagan administration was to withdraw fair housing regulations proposed at the end of the Carter administration. New proposed regulations were not issued until passage of major amendments to the law impelled action in 1988. Nor were regulations to protect disabled people under the Rehabilitation Act of 1973 issued by HUD until 1988. Also, in the first few months of the Reagan administration, the Department of Education withdrew a Notice of Proposed Rulemaking concerning a school district's obligation to assure equal educational opportunity to language minority students under Title VI. New guidelines and standards were never reissued, thereby depriving school districts, parents, and the courts of federal guidance in this critical and complex area.

In the area of age discrimination, where many important questions arise about the duties of recipients of federal assistance, key federal agencies, including the Department of Labor and Education, have failed to adopt interpretive regulations of the Age Discrimination Act since 1979.

Written policy directives are frequently used by agencies as an alternative to the adoption of interpretive regulations and rules. Such directives provide policy guidance to entities concerning their obligations under civil rights laws and to agency staff responsible for ensuring compliance. However, during the 1980s, some agencies adopted important policies in an informal and haphazard way. According to a staff report of the House Committee on Education and Labor, the EEOC's acting general counsel orally directed the commission's attorneys not to enforce existing consent decrees or recommend decrees that use goals and timetables. This oral directive was directly contrary to previously published policies set forth in the Affirmative Action guidelines and the Uniform Guidelines on Employee Selection Procedures. The Commission also orally abrogated its longstanding policy to prosecute practices that have a disproportionate adverse impact on protected classes as violations of the equal employment laws.

At the Office of Federal Contract Compliance, far-reaching policy initiatives have been implemented by handwritten notes in the margins of memoranda and through oral directives to staff. The Department of Health and Human Services has not provided technical assistance or written policy interpretations to guide hospitals in adhering to the community service assurance requirements of the Hill-Burton Act. The Act contains provisions requiring Hill-Burton hospitals to furnish emergency and other medical services to low income people. Without guidelines, however, patients cannot know their rights or hospitals know their obligations.

Many of the practices identified evaded the Administrative Procedure Act's requirement for prior publication in the Federal Register with an opportunity to comment before such policy changes become effective.

III. Efforts to Change Basic Civil Rights Policies

The decline during the 1980s in the use of standard techniques of enforcement that is described in the preceding section has been an across-the-board phenomenon which has affected the handling of routine cases as well as those involving controversial issues. In some areas, however, where important issues were at stake, the decline in enforcement was accompanied by an administration effort to reverse civil rights policies adopted by its predecessors or by Congress and the federal courts. While most of those efforts to set a new policy course have not proved successful, the struggles leave a legacy that a new administration inevitably will confront.

One major initiative of the Reagan administration was to narrow the range of civil rights protections by arguing that only intentionally discriminatory actions should violate the law. This position, for example, would exclude as violations of the laws, actions which have an adverse impact on black people and which do not serve a strong governmental or business purpose if it could not be proved that the actions were racially motivated. The proposition was first argued strongly by the administration in opposing provisions of the Voting Rights Amendments of 1982 that incorporated a "results" test for judging electoral practices that diluted minority representation. When the provisions were adopted over administration objections, the administration continued to press its position in court and was rebuffed by the Supreme Court in the 1986 case of *Thornburg v. Gingles.*

Similarly, the Department of Justice reversed prior policies by refusing to take enforcement action under the fair housing law to invalidate land use and other practices that adversely affected minorities unless there was proof of intent. In doing so, it disregarded the ultimately unanimous view of federal courts of appeals throughout the country that Title VIII of the Civil Rights Act of 1968 sanctioned use of an effects, not an intent, standard.

The Department also has taken the position that, unlike those who file charges of discrimination with the EEOC under Title VII, persons who suffer discrimination covered by the Immigration Reform Control Act of 1986 may not rely on disproportionate adverse effects to prove their case. Although such "effects" analysis is well-settled under Title VII, the Department regulations construe the anti-discrimination provision of IRCA to require that discrimination be "knowing and intentional"--words that do not appear in the statute. At least one court accepted the "effects" tests in a case under the antidiscrimination provisions of IRCA before the Department issued its final regulations.

In another effort to narrow the scope of civil rights protections, the Administration argued successfully in the Supreme Court in *Grove City College v. Bell* that laws barring discrimination in the use of federal funds only reached discrimination by the units of colleges or other large institutions that actually received the funds. Congress, over a veto by the president, reinstated broad coverage of the law by enacting the Civil Rights Restoration Act of 1988.

While these controversies over the scope of civil rights laws involved important issues, perhaps the most fundamental disagreement came over questions of remedy, particularly the use of race- and sex-conscious affirmative action. The policy of all previous Democratic and Republican administrations dating back to President Kennedy's admin-istration had been that race-conscious affirmative action in employment and other areas was needed to overcome and fully redress past practices of discrimination and exclusion. In Justice Blackmun's words, "in order to get beyond racism, we must first take account of race."

The Reagan administration espoused the view that race consciousness was a violation of principles of "color blindness" implicit in the Constitution. It sought to implement its view in a variety of ways. When the Supreme Court held in the *Stotts* case that affirmative action plans could not be used to bring about the layoff of white workers with greater seniority than minority workers, the Justice Department decided to extend the decision beyond layoffs. In the face of Court decisions holding race conscious remedies appropriate, as applied to hiring and promotion, the administration sought to undo such plans that it and its predecessors had negotiated in consent decrees with major city governments throughout the nation. Interestingly, the Justice Department's effort was resisted by the mayors of Indianapolis and most other cities that were subject to the affirmative action obligation. They asserted that the plans had worked well, had been fair to all city employees, and that dissolution of their obligation would be a regressive step.

The Justice Department continued its campaign by proposing to the president that he rescind the Executive Order requiring federal contractors to engage in fair employment practices. The purpose of the move was to repeal requirements first implemented in the Nixon administration that contractors who had failed in the past to draw upon minority and women workers available in the workforce adopt goals and timetables for improving their fair employment records. This administration effort, too, was resisted by many of the employers that were subject to the obligation, as well as by labor unions, members of Congress, and civil rights groups. Ultimately it was abandoned.

The Department extended its opposition to affirmative action to employment in the federal government as well. It refused to comply with federal law by preparing a plan with goals and timetables to improve its own fair employment record and was joined in its refusal by the National Endowment for the Humanities.

The administration's opposition to race, and gender, conscious affirmative action has extended to agencies other than the Justice Department and to areas other than employment. The Federal Communications Commission, for example, virtually abandoned policies adopted during the 1970s to stimulate minority ownership of radio and television stations. From 1978 to 1981, a policy of awarding licenses to minorities at below market prices when the licenses became available at distress sales resulted in 27 licenses going to minority owners. After 1981, only ten licenses went to minorities through this process.

In 1984, the Justice Department opposed the establishment of a preprofessional training program for minority students at public universities in Tennessee. The Department maintained its opposition despite the agreement of state officials to sponsor the program to settle a longstanding court order that Tennessee dismantle its racially dual system of public higher education. In this, as in other cases, the Department objected to race-conscious remedies that might benefit individuals who were not them-selves shown to be victims of specific acts of discrimination.

In these, as in other cases, the federal courts rejected the Department's position. In addition to its campaign against affirmative action, in the 1980s the administration opposed remedies which would implement racial integration policies embodied in federal civil rights statutes.

As noted, the Justice Department rejected Supreme Court decisions making effective desegregation the standard for determining the adequacy of steps taken by school districts to remedy constitutional violations. In housing, the Departments of Justice and Housing and Urban Development sought to dismantle race-conscious tenant selection policies designed to achieve at least minimal levels of integration in public housing developments. No policy pursued by the administration during the 1980s acknowledged the persistence of racial separation as a barrier to equality of opportunity or to the improvement of race relations.

IV. Conclusion

The campaigns by the Reagan administration to repeal fundamental policies providing for broad coverage of civil rights laws and for affirmative remedies by and large were unsuccessful. Indeed, in some cases, actions taken by the courts and Congress in response to those administration efforts resulted in a strong reaffirmation of strong civil rights policy.

Nevertheless, the struggles of the 1980s have left a legacy of confusion about the commitment of the Federal government to carry through with its promise of equality of opportunity. If strong policies remain on the books, the demise of effective enforcement programs has meant a continuing denial of opportunity to many Americans.

Reaffirming a commitment to equality of opportunity, reinstating effective enforcement programs, and restoring public confidence in government's adherence to the rule of law are the challenges facing a new administration in the 1990s.

CHAPTER III

PART 1

RECOMMENDATIONS Restoring Civil Rights Enforcement

I. The Need For Presidential Leadership in Civil Rights

If there is one constant in the continuing struggle for equality under law, it is that progress has come only during periods of strong, positive executive leadership.

In 1989, the concern that requires prompt attention by the new president is that the national commitment to civil rights has wavered. This concern is not primarily attributable to an absence of federal statutes guaranteeing equality of opportunity. Congress passed strong laws during the 1960s and 1970s. Moreover, in the 1980s these laws were reaffirmed and some of the remaining gaps filled through enactment of the Voting Rights Amendments of 1982, the Civil Rights Restoration Act of 1988 and the Fair Housing Amendments Act of 1988. Nor is the concern attributable to an absence o. strong support from the courts. Decisions of the Supreme Court and lower federal courts in the main have provided a strong underpinning for the movement to achieve equal justice. Rather, the issue is vigorous enforcement of federal statutes and court decisions by the Executive Branch.

President Bush has a genuine opportunity to reaffirm the national commitment to civil rights, to make a fresh start, and to set the nation on a course toward civil rights progress and reconciliation. He can do so by setting a standard of performance at the outset of his administration along the following lines:

1. He must make it clear that assuring equality of opportunity for all persons is among the highest priorities of his administration and that the commitment will be implemented both through enforcement of all laws and a condemnation of bigotry. Strong enforcement of civil rights laws and court decisions and support for the enactment of other legislation are essential to provide access to equal opportunity. Sustained and visible condemnation of expressions of prejudice or bigotry, whatever the source, along with efforts to heal racial and other divisions will help realize the goal of *one nation, indivisible*.

2. He should appoint persons experienced in and committed to vigorous civil rights enforcement to positions of leadership in agencies responsible for equal opportunity.

3. He should make it clear that his appointees must enforce all civil rights statutes, agency regulations and remedies sanctioned by the courts unless and until they are changed, even when the appointees may disagree with the laws.

4. He should call upon his appointees at the timeof their appointment to operate their agencies in such a way that they become known as model employers which provide equal opportunity through affirmative action programs that work.

5. He should require his appointees to adopt and submit to him within 90 days after their appointments vigorous enforcement programs which include increased efforts to root out systemic practices of discrimination through agency initiated investigations, management programs to reduce the long delays that now exist in addressing citizens' complaints, and provisions for employing administrative sanctions and court litigation to redress discrimination where settlement efforts fail.

6. He should establish mechanisms to improve coordination of civil rights enforcement policy, such as the reestablishment of an office of Civil Rights in the Office of Management and Budget to monitor agency enforcement efforts and advise the president.

7. He should appoint greater numbers of minority and women attorneys to federal judgeships in every region of the country.

A new "tone" is needed in the area of civil rights enforcement. This tone can be set only by the president--by word and by deed. We urge him to take actions such as those embodied in the above recommendations. In this way--and only in this way--will we be able to move forward in the enforcement of civil rights by the Federal Government and toward the goal of *One Nation, Indivisible*.

II. Civil Rights Policy and Remedies

Support Remedies Developed and Implemented by Six Preceding Administrations

The president should support remedies developed and implemented by six predecessors--Presidents Eisenhower, Kennedy, Johnson, Nixon, Ford, and Carter--by Congress and the courts to eradicate discrimination and provide equal opportunity for all citizens. Consistent with this policy, the president should give consideration to the following recommendations:

Require Federal Departments and Agencies to Enforce All Statutes, Regulations, and Applicable Court Decisions.

Federal departments and agencies should enforce all statutes, regulations, and guidelines unless and until they are changed. Similarly, the Supreme Court's constitutional and statutory interpretations of civil rights obligations must be observed by the federal government in all cases, not simply the one in which the issue arose. The rule of law must prevail and civil rights remedies that will eradicate discrimination in a timely and effective manner must be employed even where members of departments and agencies may have policy or ideological reasons for disagreeing with remedies sanctioned by Congress and the courts.

Our system of government provides an orderly and open method for bringing about changes in what is now the law of the land. The system does not, and should not, recognize a policy of nonacquiescence.

Require Federal Departments and Agencies to be Leaders in Providing Equal Employment Opportunity.

The federal government should act as a model employer and reaffirm our national commitment to ending discrimination by providing equal employment opportunity through affirmative action programs that work. Although there have been modest improvements in the employment of minorities, women, and persons with disabilities, in the federal sector, some federal agencies will have to make significant changes in their employment practices if they are to achieve real progress toward their goals, particularly in hiring and promoting persons with disabilities.

Agencies Should Support the Use of Goals and Timetables and Other Proven Affirmative Action Remedies in Appropriate Cases.

The Department of Justice, the Equal Employment Opportunity Commission, the Department of Education's Office of Civil Rights, the Department of Health and Human Services, the Department of Housing and Urban Development, the Department of Labor, and all other federal agencies should uphold and enforce court decisions that have interpreted the Constitution and laws to require or permit numerically-based remedies, primarily goals, and timetables, as redress under federal civil rights laws and executive orders.

Goals and timetables should be among the mix of remedies used to eradicate discrimination in appropriate cases, including those settled pursuant to consent decree. Federal policies which have sought to confine affirmative action remedies only to identified victims of discrimination, run counter to Supreme Court decisions and unduly constrict remedies designed by Congress and the courts to benefit members of groups which have been discriminated against.

The Federal Government Should Require School Districts to Use the Full Range of Constitutional Remedies for Unlawful School Segregation.

The Departments of Justice and Education should require school districts to use the full range of remedies, including mandatory student reassignment, compensatory education programs, and interdistrict relief to achieve meaningful desegregation of intentionally segregated public schools. Remedies that the Supreme Court has held are constitutionally mandated or authorized may not be excluded by federal officials because they disagree with them.

This means that the federal government should pursue policies which reflect the principle set forth in *Green v. School Board of New Kent County*, that school districts that have violated the Constitution have an affirmative duty to implement plans that promise "realistically to work, and ... realistically to work now." Under the *Green* principle, magnet schools or other remedies that involve the exercise of parental choice must be linked to other measures which assure that schools will reach specified levels of desegregation.

In addition, the Department of Justice should launch investigations of whether interdistrict constitutional violations have occurred in large metropolitan area school districts and, where such violations are found, should seek metropolitan remedies of the kind that have proved successful in cases brought by private plaintiffs. The Department should agree to terminate court-ordered school desegregation plans, only when the school district agrees to refrain from practices which will cause resegregation and all vestiges of prior discriminatory practices have been eliminated, including patterns of residential segregation caused by segregation of the schools.

The Departments of Justice and Housing and Urban Development Should Use an Effects Standard in Prosecuting Violations of the Fair Housing Law.

The Department of Justice should cease its current policy of refusing to prosecute violations of the fair housing laws unless there is proof of ra-

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cial intent. All courts of appeals that have ruled on the issue have held that violations of the Fair Housing Law occur when practices have a disproportionate
adverse impact on minorities or perpetuating residential segregation unless there is compelling justification for continuing such practices. There is no legal basis for the policy currently being followed by the two departments.

III. Vigorous Enforcement Action

Although the precise level of activity has varied, every Republican and Democratic administration during the 1960s and 1970s has had an active program of civil rights enforcement. During this period, federal agencies charged with implementation of the civil rights laws developed techniques of enforcement that produced positive results: efficient complaint processing, self-initiated investigations of systemic discrimination, clear and specific settlement agreements, vigorous use of sanctions (including, where needed, fund withdrawal from federal grantees), disbarment of federal contractors who violate the law, and adequate data collection.

During the 1980s, many of these methods of enforcement fell into disuse. Victims of discrimination and underfunded private groups have been forced to shoulder the burden of enforcing most civil rights statutes although those laws place primary responsibility on federal agencies. Whether measured by the large number of privately litigated cases reported, or by privately funded studies of the extent and nature of discrimination, this major lapse in federal enforcement has permitted illegal discriminatory practices, some blatant and many subtle, to flourish in our society. Accordingly, all departments, and agencies should act quickly and decisively to reaffirm the central role of the federal government in eradicating illegal discrimination and to mount major efforts to enforce civil rights laws. Consistent with such a program of enforcement, departments and agencies should implement the following recommendations:

Increase the Number of Self-Initiated Investigations of Systemic Patterns and Practices that Perpetuate Discrimination and Take Enforcement Action to Combat Those Practices.

Federal agencies should increase the number of self-initiated investigations of systemic patterns and practices to determine whether regulated entities are complying with nondiscrimination laws.

Such investigations often reveal more widespread discriminatory practices and provide remedies to greater numbers of victims than do complaints brought by individuals. Notwithstanding that fact, there has been a precipitous decline in the number of systemic investigations initiated by federal agencies during the 1980s.

Federal agencies should select sites for investigations based on regular and comprehensive collection of data. Data should be collected more frequently from entities with a higher likelihood of noncompliance with equal opportunity laws, based on such factors as their history of discrimination or demographic changes in population served.

Develop Management Programs to Ensure Timely Resolution of Individual Discrimination Complaints.

Management programs should be developed to ensure that federal enforcement agencies investigate and resolve individual complaints of discrimination on a timely and effective basis. A top priority of agencies should be to reduce backlogs of complaints, to assure that complaints are not closed or improperly suspended with incomplete investigation, and that staff operate pursuant to written guidelines designed to ensure consistent and correct application of the law. Mandated timeframes for the processing of complaints should allow additional time for complex, multi-issue, multi-party complaints. Agencies should be required to report annually the number of complaints that were processed according to the timeframes and the additional resources necessary to achieve compliance.

Only through this kind of upgrading of complaint-handling systems can citizens have confidence that government will be responsive to grievances based on claims of discrimination.

Agencies Should Settle Cases Only Where They Obtain Remedial Plans which Obligate Entities to Take Specific Steps which will Correct Violations.

A fundamental aspect of sound enforcement policy is that in dealing with systemic or institution-wide discrimination, agencies must require remedial plans which obligate entities to take specific steps to correct discrimination. It is not enough for agencies to rely on assurances of good faith or nonspecific future actions. This latter policy--which is currently in use--has resulted in settlements which neither require entities to achieve any specific progress nor provide mandatory alternatives where the good faith effort does not remedy the violation. Mere reliance on "good faith efforts" rather than on results achieved, contradicts long-established legal principles and bipartisan enforcement policies formulated during the 1960s and 1970s. In some later cases initiated by the Department of Justice, victims of discrimination represented by private counsel have successfully objected to the inadequacy of relief embodied in a settlement agreed to by the government.

Presettlement consultations should also be held with the purported beneficiaries of settlement agreements to enable them to express their views about whether their rights and interests are adequately protected.

Where Settlements that Fully Redress Discrimination Cannot be Obtained, Agencies Should Take Vigorous Enforcement Action Including Litigation and Administrative Sanctions Such as the Withdrawal of Federal Funds and Debarment of Contractors.

During the 1960s and 1970s, federal enforcement agencies, exercised active and visible leadership in the development of civil rights protections by filing and litigating numerous cases. During the 1980s, however, these same agencies eschewed investigation of new cases and virtually ceased trial and appellate litigation or other enforcement action in nearly every major area of enforcement.

While the application of sanctions is ordinarily a course to be taken only after other efforts have failed, it must be a credible alternative if civil rights enforcement is to succeed. Only when they believe that sanctions will be applied will many entities that have engaged in discrimination agree to meaningful settlements.

Federal Policy Should Encourage, Not Undermine, Private Enforcement by Victims of Discrimination.

Federal agencies should rescind policies and practices that have had the effect of undermining private initiatives to enforce civil rights laws. Government opposition to a victim's efforts to protect his or her personal rights is antithetical to the purposes of the civil rights laws and to basic principles of self-government.

Recent practices which have had the effect of undermining private enforcement of civil rights laws include opposition to the intervention of victims in cases initiated by the government. In other cases, the federal government has opposed settlement agreements between private plaintiffs and defendants. In still others, the Department has abandoned longstanding positions favoring victims of discrimination on grounds that the relief goes too far, and has even switched sides to support defendants. Most of these newly adopted positions of the government have been resoundingly rejected by the Supreme Court and by federal appellate courts.

Federal agencies also should reexamine their blanket policy against intervening in all cases filed by private plaintiffs who have adequate resources to prosecute the case and have raised proper issues. There are many instances in which government participation would be sound policy because of the national perspective, expertise, and depth of experience that federal agencies can lend to assist the court.

Federal Agencies Should Adopt Regulations and Policy Directives to Interpret Civil Rights Laws.

Executive Departments and agencies should adopt interpretive regulations consistent with congressional intent to provide for effective enforcement of civil rights statutes. Several agencies have failed to propose or adopt interpretive regulations of numerous statutes until many years after statutes were enacted by Congress. One example, is the Department of Housing and Urban Development which did not issue substantive regulations under the Fair Housing Act of 1968. The agencies' lack of timely action has impeded their ability to review compliance with civil rights laws and undermined private enforcement efforts.

To avoid protracted delay in adopting interpretive regulations, Congress should consider enacting legislation to require agencies to propose and adopt regulations within mandated timeframes.

Measures to Strengthen Enforcement Programs of the Equal Employment Opportunity Commission.

The lack of a vigorous program of enforcement has been particularly acute at the Equal Employment Opportunity Commission (EEOC). For this reason, special measures are needed to strengthen the EEOC. First, the EEOC must act quickly and decisively to institute management systems to reduce the ever-growing backlog of complaints. Systems which proved successful in reducing the backlog during the 1970s and early 1980s were dismantled in 1983. According to a recent report of the General Accounting Office, the Rapid Charge Process, which offered parties the opportunity to negotiate complaints with little investigation, was successful in achieving a major reduction of the backlog of complaints. Since its abandonment, according to the GAO, the backlog of cases has *doubled*. A new system must also allocate investigative resources in a sensible manner, rather than assuming that all complaints call for equal resources.

Second, the EEOC should initiate and file new cases challenging patterns and practices of discrimination by private employers and employee organizations. In recent years EEOC has virtually ceased to initiate and file such cases despite the fact that it has primary authority to do so. Comprehensive investigations of systemic discrimination should be conducted and cases filed against employers and unions with the worst employment practices.

Third, a new plan is needed to revise the processing of discrimination complaints filed by federal employees and applicants. Under current law, the EEOC has delegated complete responsibility for investigating and resolving complaints to the department or agency where they arose. Congressional committees, the General Accounting Office, and others have severely criticized that structure as replete with conflicts-of-interest, and causing inordinate delays. Any plan to reform the processing of discrimination complaints filed by federal employees should preserve complainants' right to an administrative hearing and designate the EEOC, rather than the department or agency, to be the decision maker after the hearing. The EEOC should retain responsibility for investigation of complaints, unless it is satisfied that the department where it arose will resolve complaints in a timely and fair manner.

Collect and Publish Enough Information to Permit Efficient Enforcement of the Civil Rights Laws.

The Office of Management and Budget and all departments and agencies should adopt data collection policies that will permit efficient enforcement of civil rights laws. The data needed include comprehensive analyses of the nature and extent of systemic discrimination against blacks, Hispanics, Native Americans, women, disabled people, and other groups protected by the laws compared to the population as a whole, and surveys of whether particular institutions and entities conform their policies and practices to the law.

Adequate enforcement of civil rights statutes depends on the collection of data. Without data, agencies cannot identify, monitor, or verify the practices and policies which violate the law. Data collection need not create undue burdens. Mechanisms such as the EEOC Coordinating Council have been created to avoid unnecessary duplication and to minimize the burdens on business. Yet, in the 1980s the ability of federal agencies to detect discriminatory practices and ensure that they are eradicated has been crippled by the failure to systematically collect data. Among the specific needs are the following:

- The Secretary of Education should conduct a comprehensive count of the number of language minority children in need of bilingual or English as a Second Language instructional services. As early as 1982, Secretary of Education Bell acknowledged that the "lack of [an] accurate count is a matter of national concern."

- The Secretary of Education also should rescind a policy adopted in 1984 of sampling school districts at random to collect information on the racial composition of schools, classes, faculty and related services. Random sampling has resulted in approximately two thousand school districts previously surveyed between 1978 and 1982, being completely bypassed from 1982 to 1988. The new secretary should return to the pre-1984 methodology, including a comprehensive survey of school districts as necessary to restore the integrity of the civil rights survey data base.

- All federal agencies which regulate financial institutions should conduct and publish research on systemic patterns and practices that affect the availability of mortgage loans to minorities and women. No meaningful data collection on this subject has taken place in the last eight years.

- The Equal Employment Opportunity Commission should investigate the continued existence of systemic patterns and practices that limit equal opportunity on a company, or institution-wide basis. This will facilitate an enforcement program which targets companies with the worst records.

- The Department of Health and Human Services should study the incidence and causes of racially disparate use of health services, particularly by Medicare patients.

IV. Presidential Appointments

In Appointments to the Federal Bench, High Priority Should be Given by the Administration to Selecting Nominees Who Will Make the Judiciary More Broadly Representative of the American People and Who Have a Demonstrated Commitment to Equal Justice Under Law.[*]

Competence, integrity and a judicial temperament clearly are critical factors in the selection of people for federal judgeships. Other factors are extremely important as well.

If the federal judiciary is to be perceived as fair by the American people, and if it is, in fact, to do justice, its members cannot be drawn from a single stratum or segment of American society. The issue is not one of parity or proportional representation of any segment of society. Rather, the issue is simply that a judiciary which reflects the great diversity of this nation will have a depth and variety of experience that will enable it to deal fairly and sensitively with the cases that are brought before it. One principal way to accomplish this goal is for the administration to draw on the increasing pool of talented minority and women attorneys in making appointments to the federal bench. This kind of outreach can be accomplished through a variety of mechanisms, including the establishment of regional commissions to identify minority and female candidates for the bench, and regular consultations by the Justice Department with the professional associations that represent minority and women attorneys on the national and local levels. Efforts to secure greater input from the public on nominees could also increase the pool of minority and women attorneys.

A second goal of great importance is the selection of persons who have a demonstrated commitment to equal justice under law. While there is no checklist of characteristics that determine such a commitment, several factors are relevant. In recent years, nominations have failed or been withdrawn when it was discovered that the candidates had, by word or deed, demonstrated racial or other forms of prejudice. Increasing attention also has been paid by the Senate Judiciary Committee to a nominee's current association with organizations that are exclusionary in their membership standards. In addition, weight should be given to positive factors such as the record of candidates in community or *pro bono* representation activities on behalf of the disadvantaged. Further, there has been increasing recognition of the need for nominees who understand the central role of the federal courts in protecting the rights of persons who cannot obtain protection elsewhere in the political process.

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[*] Commissioner Harold R. Tyler did not participate in the consideration of the views expressed herein. He serves as Chairman of the Standing Committee on Federal Judiciary of the American Bar Association.

Finally, with the Senate's reaffirmation that its constitutional duty to "advise and consent" makes it a full partner in the judicial selection process, there has come a need for better consultation by the Executive Branch with the Senate. While confrontations sometimes are unavoidable, if the new administration finds ways to consult and cooperate with the Senate Judiciary Committee in advance of nominations being forwarded, it may contribute to the goals of a stronger, fairer, more representative federal bench.

Persons Nominated and Confirmed to Independent Agencies and Executive Branch Positions with Responsibility for Enforcement of Equal Opportunity Laws Should have a Record of Commitment to and Support for Enforcement of Civil Rights Laws.

As this report has demonstrated, there is a major rebuilding job to be done if federal agencies are to become effective instruments in protecting the rights of citizens. Many federal civil rights enforcement agencies have not investigated and resolved individual complaints on a timely basis, have conducted few self-initiated investigations of systemic discrimination, and have failed to develop and implement adequate training programs or guidelines to advise staff on proper investigative procedures. The departure of experienced lawyers and investigators has weakened the staffs of many civil rights enforcement agencies. Remedies and enforcement techniques that once brought civil rights gains have fallen into disuse.

The rebuilding job can only be done if the persons appointed to head the civil rights programs of each agency have strong substantive skills in civil rights and a commitment to enforce the law. At one time it was thought by some that a lack of background in civil rights demonstrated objectivity. If there was ever any merit to that notion, there is none now.

V. EASING RACIAL AND ETHNIC TENSIONS AND CONFLICT

A first priority for the new administration should be to take visible and sustained initiatives to deal effectively with the evident rise in intergroup tension and conflict that occurred during the 1980s.

Establish a Cabinet-Level Task Force made up of the Heads of those Cabinet Departments that have Program Responsibilities and Resources that can be Focused on Intergroup Tensions and Conflicts with Instructions to Develop and Submit to the President within Sixty Days a Coordinated Action Plan for Dealing with both the Causes and Results of these Conflicts.

The evidence of a deterioration in intergroup relations in the United States has become painfully apparent. Racial conflict appears to be on the rise despite an increase in the number of criminal civil rights prosecutions brought by the Reagan administration's Justice Department. The dramatic episodes of racial violence that occurred in Howard Beach, New York and Forsythe County, Georgia, have been replicated in other less publicized confrontations around the nation. The expressions of racial bigotry that were evoked by a court order to remedy housing discrimination in Yonkers, New York, are all too common in other communities in which minority families move into previously all-majority neighborhoods. Disturbing incidents of religious bigotry, such as vandalism of synagogues, also continue. Most disturbing are the many recent acts of racially motivated vandalism or bigotry that have occurred on college campuses around the nation.

In addition, with the rise in immigration there has been a resurgence of nativism, manifested in part by legislative efforts to repress foreign languages. Proficiency in English is an essential attribute of citizenship. But care must be taken to ensure that such efforts do not create new barriers for citizens not yet proficient in English, and hinder their fulfillment of such rights and duties of citizenship as voting or receiving essential government services. For example, efforts to abolish bilingual ballots and educational programs that make some instructional use of a student's native language serve to exacerbate tensions without accomplishing legitimate objectives.

There is now, clearly, an urgent need for positive presidential leadership. The machinery that now exists in the federal government--largely represented by a small Community Relations Service buried in the Department of Justice--is clearly inadequate. On the other hand the problem of intergroup tension and conflict should not be assigned to an outside "blue-ribbon" commission. What is required is a cabinet-level task force, established by the president, and made up of the heads of those Cabinet Departments whose program responsibilities and resources would enable them to develop and implement coordinated plans to deal with the causes and results of conflict and promote intergroup understanding. In establishing such a task force, the president should make it clear that he expects the personal participation of members of his cabinet and that the ultimate responsibility for employing the resources of each department to achieve the objectives of the task force resides at the top of each agency. The President should ask to have the action plan on his desk in sixty days.

Enact Legislation to Establish a System of Comprehensive National Reporting of Violent Crimes Motivated by Prejudice and Bigotry.

The president should support and Congress should enact legislation to collect data about violence stemming from racial, religious, and ethnic prejudice as part of the National Uniform Crime Report Index. No such records are currently kept on the national level to assist local communities and law enforcement agencies by identifying the frequency, location and pattern of hate crimes over time. During the 100th Congress, such legislation overwhelmingly passed the House of Representatives and was reported unanimously by the Senate Judiciary Committee to the full Senate, but was not acted on prior to adjournment. The legislation is supported by thirty State Attorneys General and major law enforcement groups.

VI. MONITORING OF CIVIL RIGHTS ENFORCEMENT

The effectiveness of civil rights laws and executive policies has always depended upon vigilant action by public bodies that monitor and oversee federal agencies charged with administering the law. With the regression that has occurred in the 1980s, the need for such monitoring and oversight, if anything, has increased. Federal departments and agencies seeking to rebuild their civil rights enforcement capacity will need support, encouragement, and additional resources from the president and Congress. They will also need a watchful eye, constructive criticism and, occasionally, congressional demands and executive action to change personnel and policies.

Action by the President and Congress to Strengthen the Monitoring Capacity of Agencies Under Their Control.

During the 1980s several congressional committees, notably House Committees on the Judiciary, Education and Labor and Government Operations, investigated and held hearings on deficient civil rights performance by various federal agencies. Such investigations should serve as models for other congressional committees and should be maintained and expanded. At the same time, it is realistic to recognize that the press of other legislative business often makes it difficult for congressional committees to initiate oversight activities or to sustain scrutiny over time even after having issued a report calling for corrective action. Other measures are needed, including continuing action by the General Accounting Office, acting on its own initiative or at the instance of Congress, in monitoring federal agencies.

As for the Executive Branch, the president should consider rebuilding the monitoring capacity lodged in the Office of Management and Budget during the 1970s. In addition, OMB's Special Analysis of Civil Rights Enforcement Activity should be reinstated as part of the annual budget submitted to Congress. As noted elsewhere in these recommendations, if civil rights laws are not vigorously enforced, other important policy objectives including social and economic initiatives will be significantly harmed.

Unless the U.S. Commission on Civil Rights is Reconstituted as a Bipartisan Independent Monitoring Agency, It Should be Abolished.

Unless the new administration is willing to join the Congress in reconstituting the U.S. Commission on Civil Rights as an autonomous bipartisan agency with members who are both independent and of unquestioned ability, Congress should refuse to reauthorize the agency.

For some twenty-five years, the Commission was the principal source of information about discrimination and analysis of federal agency performance in combating it. Because of its statutory mandate and tradition of bipartisanship and independence, the Commission could be critical, sometimes harshly so, of the government of which it is a part.

This role changed abruptly when members of the Commission were fired for criticizing federal department and agency performance and were replaced by other commissioners. Congress dealt with the problem through ensuring designation of some members by the congressional leadership. This resulted only in insuring a dissenting voice at the Commission. Consequently, the Commission's role as a fact-gatherer and monitor of federal performance has virtually disappeared, and it is beset with severe problems of mismanagement, lack of purpose, and very little accomplishment.

If the Commission is not thoroughly reconstituted as a bipartisan, independent agency it should be abolished. Mechanically, such a transformation can occur by creating a new Commission with the original system of presidential appointments and Senate confirmation of commissioners, along with a provision allowing removal only for cause. In practice, however, it can only occur if the president is prepared to appoint distinguished citizens whose independence is unquestioned. If these conditions can be established, the agency could again become a bipartisan, independent monitor and indeed might assume other important responsibilities such as investigation into potentially effective measures for providing opportunity for those locked in poverty by multiple factors of discrimination and deprivation.

PART 2

Looking To The Needs Of The Future

Much of the civil rights debate in the 1980s has focused on whether remedies and enforcement techniques that had been employed by the federal government for years should continue to be used to secure effective protection against discrimination. Most of the recommendations contained in the preceding sections are directed toward restoring policies and methods of enforcement that were initiated in the 1960s or 1970s but that fell into disuse or were dropped by the past administration.

But in this struggle over whether the clock should be turned backward, the needs of the future should not be neglected. Mere restoration of the *status quo* that existed prior to the 1980s will not provide genuine equality of opportunity for persons who have been subject to discrimination and deprivation. Nor is the *status quo* adequate to meet the needs of the nation. It is generally recognized that there is a pressing need to upgrade the education and technical skills of the nation's workforce to enable the United States to compete effectively in the 21st century. It is an unarguable demographic fact that the workforce of the future will be drawn largely from the ranks of women and minorities. In this situation, it is simply bad business as well as injustice to allow the potential of any citizen to be stunted by discrimination or neglect.

In this section, the Commission sets out several recommendations that look to the future

I. New Legislation To Extend Civil Rights Protections

In most areas, Congress has already enacted laws barring discrimination and has given to the executive departments and other agencies the necessary enforcement tools. In those areas, strong enforcement is dependent almost entirely on executive leadership. However, in other areas critical gaps remain in the laws to eradicate discrimination that need to be filled by new legislation. The Bush administration should give its full backing and support to the following recommendations:

Extend Current Civil Rights Laws to Protect Disabled People Against Discrimination in the Private Sector.

People with disabilities first received protection against discrimination in 1973 when Congress enacted the Rehabilitation Act, a statute which applies solely to the federal government, federal contractors, and federally assisted programs. Under that Act, it is unlawful for federal departments, and agencies, contractors who do business with the federal government and institutions which receive federal assistance to discriminate against persons with disabilities. When the 100th Congress passed the Fair Housing Amendments Act of 1988, it extended nondiscrimination protections for people with disabilities to the private sector for the first time.

The protections embodied in the Rehabilitation Act and Fair Housing Amendments Act of 1988 are not absolute, but often involve a balancing of rights and interests. So, for example, employers or providers of housing need only make a "reasonable accommodation" to "otherwise qualified persons." These broad concepts have been given content over the past decade by regulations and court cases that, in general, have provided opportunity for disabled persons while allaying concerns that employers and other institutions would be faced with enormously burdensome costs in making facilities accessible. This body of regulation and case law would help give content to a new statute as well.

Failure to bar discrimination by private, state and local employers, and by providers of basic services, such as transportation, communications, and health, would mean a continuing denial to disabled people of opportunities to participate and contribute to American society.

Legislation that meets the basic gaps has been drafted and was introduced as the "Americans with Disabilities Act" at the end of the 100th Congress.

Permit Citizens to Register for Federal Elections by Mail and to Remove Deadlines for Registering in Person.

The President should support legislation to permit citizens to register in federal elections by mail and to remove deadlines for registering in person. The legislation is needed because restrictive practices continue to impede participation of large numbers of minority, disabled, and low-income citizens in the electoral system. Many barriers, such as inaccessible sites and limited hours for registering to vote, as well as dual registration requirements, would be removed by the proposed legislation. The Citizens' Commission provided extensive documentation of the problem in a 1988 report, *Barriers to Registration and Voting: An Agenda for Reform.*

The Universal Voter Registration Act of 1988, was introduced in both the House of Representatives and the Senate during the 100th Congress. The Senate Rules Committee and the House Subcommittee on Elections held hearings on the proposed legislation.

In Responding Legislatively to the Crisis in the Savings and Loan Industry and in Other Federally Regulated Financial Institutions Congress Should Include Provisions to Strengthen Proscriptions Against Redlining and to Stimulate Community Reinvestment.

It seems clear that one of the early tasks of the new administration and the 101st Congress will be to deal with an acknowledged crisis of liquidity that exists in the savings and loan deposit insurance programs. According to some estimates, hundreds of savings and loan institutions are insolvent and the federal programs which insure customer deposits are cash poor. Protection of depositors may well require a costly infusion of federal funds.

If, however, Congress is to enact "bail-out" legislation, it should insist that the industry it is restoring meet its obligations to deal fairly with citizens and with the communities in which thrift institutions operate. One major persistent problem is that of redlining refusal by lending institutions to make loans in areas inhabited by minorities. Legislation to bail out the deposit insurance programs of federally regulated banks and thrifts should include provisions significantly strengthening the ban against redlining, embodied in the Community Reinvestment Act, and the mechanisms to monitor compliance with that Act.

Under existing law, federally regulated banks and thrifts must determine and meet the credit needs of communities they serve, including low- and moderate-income neighborhoods. Federal bank regulatory agencies consider a financial institution's compliance with the Community Reinvestment Act as one factor among many during periodic examinations of a bank's financial "safety and soundness" or in response to a challenge of a bank's application for permission to open new branches or to merge.

Among the reforms needed to strengthen the ban against redlining are centralizing enforcement authority that presently is now diffused among a multiplicity of agencies, further specifying of standards to be used by federal bank regulatory agencies to measure compliance with community reinvestment laws, and creating mechanisms for effective private enforcement.

Correct Substantial Undercounting of Minorities During the 1990 Decennial Census.

Among the first items of business upon taking office, President Bush should restore the Census Bureau's program to provide a statistically sound method to correct the disproportionate undercount

of minorities during the 1990 decennial census. The substantial undercount of minorities leads to under-representation in state and local legislatures and to the misallocation of federal funds for education,
environmental protection, and other services distributed on the basis of population.

While decisions on how to correct the census need not be made until after it is completed in December 1990, the data upon which to base decisions will not be available unless the ban on data collection imposed by the Department of Commerce is lifted. The Census Bureau program is strongly supported by special panels of experts of the National Academy of Sciences and the American Statistical Association.

Because the "window of opportunity" for implementing the Bureau's program is quickly closing, the president should act immediately. Failing an executive decision, Congress should consider legislation to require the Department of Commerce and the Census Bureau to implement statistically sound programs to develop a data base to correct the substantial undercounting of minorities during the 1990 decennial census.

II. Providing Opportunity To Disadvantaged Citizens.

Civil Rights Policy Should Be Better Targeted to Protect the Rights of Disadvantaged Citizens.

Civil rights laws are not a panacea. They can remove barriers that a person faces that are attributable to racial or other forms of discrimination. But the laws do not, in most circumstances, address obstacles that arise from deprivation or neglect rather than from discrimination.

However, civil rights laws could make a practical difference in the lives of more low-income citizens, if the people charged with administering them focused more attention on the protections the law affords this segment of the population. For example, where racial and economic factors combine to deny a person access to opportunity, there has been a tendency among federal officials to shy away and instead to tackle cases that involve racial factors alone. The reasons for such preferences may be understandable. Issues involving race and class are often more politically charged than those involving race only. They may also appear more intractable; just as many administrators of job training programs may prefer to "cream" those most prepared to be trained, so civil rights officials may prefer the easier cases.

But civil rights policies and enforcement programs that neglect low-income minorities, low-income women, low-income disabled people, are shortsighted. They do not afford the full measure of protection that the law contemplates and they impose economic and social costs on society.

A better targeted civil rights policy in housing, for example, would direct more enforcement effort to the elimination of exclusionary land use practices and residential mortgage loan criteria which, although couched in non-racial terms, effectively ban the entry of minority citizens into many communities. Restrictive land use practices do more than deprive minority citizens of housing choices. They effectively exclude the children of low-income minority families from education and other services they need to become productive citizens. They cut minority workers off from access to jobs, particularly in burgeoning suburbs, where the bulk of growth in service, manufacturing, and retailing estabishments is occurring, along with increases in public sector employment. Failure by federal officials to address land use barriers constitutes a tacit acceptance of the condition of extreme isolation that relegates low-income minorities to separate and inferior services in most metropolitan areas of the nation.

A better targeted civil rights policy in education would focus greater attention on public school practices that place disproportionately high numbers of minority children in classes for the mentally retarded or for low ability students at the earliest stages of their school career. Such practices mislabel low-income minority children as unable to learn and provide a rationale for failures to teach them. A better targeted policy in education also would build on the successes that private civil rights organizations have achieved in some interdistrict school segregation cases and initiatelitigation to provide desegregation throughout metropolitan areas.

A better targeted policy in health would require the Department of Health and Human Services to take action to enforce the obligation of Hill-Burton hospitals to make services available to all people in the community. Past failures to enforce this obligation have had a drastic impact on poor people, many of whom lack access even to transportation to health facilities.

A better targeted policy for enforcing the rights of disabled persons would assure that the statutory requirement that "related services" be provided in education be interpreted to include health procedures that disabled children need to participate in classrooms. Exclusion of such services places a heavy burden on families who lack the means to purchase the services on their own.

In sum, the targeting of enforcement programs suggested by the examples above could provide practical opportunities to people who, although victims of discrimination, have reaped little gain until now from the existence of federal civil rights laws.

The Administration Should Recommend, and Congress Should Give Priority Consideration to, Legislation Which Gives More People Access to the Equal Opportunities Guaranteed by Civil Rights Laws.

Several decades of experience have demonstrated that the legacy of discrimination and deprivation has had so strong an impact that many of our fellow citizens need a helping hand from government to derive benefit from civil rights laws. In other words, programs are needed which will give more people access to the equal opportunity promised by civil rights laws.

For example, in the area of elementary and secondary education, the Headstart program has demonstrated its capability of equipping children from low-income families to start public school on a more equal footing. But fewer than one of five eligible children is enrolled. The program should be fully funded to enable children of low-income families to begin elementary school without serious educational deficits. Both the Title I program of the Elementary and Secondary Education Act, which has provided effective, service to children in schools in low-income areas, and the Bilingual Education Act, which enables students to overcome language barriers to full participation in the education process, are underfunded in comparison to the pool of children who could benefit from such programs.

Special measures are also needed in the area of higher education. The Upward Bound program has proved its effectiveness and a major increase in funding would enable far more low-income students to reap the benefits of college preparation assistance that has enabled many to enter and graduate from four-year colleges. Pell grant programs--the federally funded scholarship for low-income students--should be funded at levels to reduce the amount of debt incurred by these students and enable a far larger number to attend four-year public and private colleges.

During the past year, Congress considered but did not enact legislation needed to strengthen families in which single parents or both parents must work. Likewise legislation is needed to open up job opportunities; e.g., by taking action to deal with our rapidly deteriorating infrastructure. The enactment of childcare legislation will make it possible for low-income parents to work by providing assistance for the care of their children in a safe environment. And, family and medical leave legislation will assure the job security of workers who must take leave to attend to problems affecting the health and well-being of themselves or members of their families.

It is also apparent that new legislation is needed to reverse the recent drastic reductions in federal housing assistance for low- and moderate-income persons, reductions that have contributed to the exacerbation of problems of homelessness and racial isolation.

Clearly, the legislation described above is not limited to any particular group of beneficiaries. It would extend assistance to economically disadvantaged white males as well as minorities, women, and disabled people. At the same time, the relationship of measures of this kind to equality of opportunity should be apparent. A black child, who in her earliest years is deprived of adequate nutrition and health care, may have no practical access to equal educational opportunity. An economically disadvantaged mother seeking fair treatment in the job market may benefit little from the protections of the equal employment laws if she lacks access to affordable childcare. In these and other instances, some forms of basic assistance must be available to minorities, women, and disabled people if they are to have access to the equal opportunities that civil rights laws are designed to secure.

A major objection posed to such legislative recommendations is that they are costly to implement and will overload the federal budget at a time of major deficits. But before reaching the conclusion that these measures must be deferred until times are financially less stringent, the administration and Congress should conduct a cost-benefit analysis comparing the short-term costs of the legislation with the long-term costs that will be incurred by continuing neglect of the major problems that the legislation is designed to redress. Such an analysis should, for example, take into account the evidence that investments in early childhood education and development for low-income children significantly diminishes the likelihood that society will later incur costs associated with drug involvement, teenage pregnancy, incarceration for criminal offenses, and joblessness. The analysis should also gauge the losses in economic productivity that the nation will suffer if it continues to neglect the potential of many of its citizens; e.g., by being satisfied with a patchwork medical system which ignores the health needs of many citizens.

Any fair analysis will conclude that an administration and Congress willing to incur deficits designed to stimulate economic growth and assure national security should be willing to make investments in human growth and development that will serve those objectives and that will ultimately be repaid severalfold.

SECTION II

WORKING PAPERS

CHAPTER IV

FEDERAL POLICY DEVELOPMENT, COORDINATION, AND MONITORING

by Deborah P. Snow[1]

> *[T]he president's words and deeds, particularly early in a new administration, establish priorities and expectations for federal officials.*

I. Introduction

Executive direction and oversight is essential to effective federal civil rights enforcement. In all policy areas, the president plays a unique and substantial role in setting a national agenda of attention, establishing a tone for public and governmental concern, interpreting events, and communicating public values. This is partly, but by no means solely, a symbolic role, for the president's words and deeds, particularly early in a new administration, establish priorities and expectations for federal officials as well. The importance of presidential leadership is heightened in civil rights because of the historical circumstances of massive state-sanctioned deprivations of civil rights, the federal part in the struggle to overcome them, and the halting establishment in the last 30 years of a framework of federal civil rights protections whose enforcement has been easily stalled and undermined.

Federal civil rights enforcement is characterized by fragmentation and decentralization of authority, policy development, and operational responsibility. These characteristics result in part from piecemeal definition of protections and creation of enforcement agencies, procedures, and remedies.[2] Also, the conceptual approach of certain federal enforcement programs (*e.g.*, nondiscrimination and affirmative action in federal contracting and nondiscrimination in the use of federal funds) dispersed civil rights enforcement responsibility to the myriad procurement and program operating agencies.[3] Expansion of such requirements in legislation creating revenue sharing[4] and block grant[5] programs and extension of protections to additional groups has resulted in assignment of some degree of enforcement authority to scores of federal agencies.[6]

As the leading monitor of the emergence and effectiveness of federal civil rights enforcement during the 1970s, the U.S. Commission on Civil Rights stressed the importance of developing more effective mechanisms to address the resulting persistent problems of policy, enforcement inconsistency, and duplication of compliance and enforcement efforts.[7] For example, although Executive Orders 11247 and 11764 assigned the Justice Department authority to coordinate interpretation of legal requirements and enforcement policy under Title VI, despite criticism from the Commission, the Department--and at least some agencies--interpreted its authority as suggestive, not directive.[8] Similarly, the Equal Employment Opportunity Act of 1972 addressed the increasingly evident coordination problem by creating the Equal Employment Opportunity Coordinating Council (EEOCC), to be composed of senior officials from four agencies with equal employment enforcement responsibilities--the Equal Employment Opportunity Commission (EEOC), the Department of Justice, the Department of Labor, and the Civil Service Commission--and the U.S. Commission on Civil Rights.[9] It provided a forum for inter-agency discussion (including progress toward uniform guidelines for employee selection tests) but, according to the Commission, lacked the teeth and incentives essential to meaningful coordination.[10] Within the employment area, the Commission called for greater consolidation, streamlining, coordination, and monitoring of the contract compliance program then dispersed among more than ten procurement agencies and the Department of Labor's Office of Federal Contract Compliance.[11] In addition to emphasizing the need for coordination of enforcement of these similar, or identical, civil rights protections, the Commission strongly recommended creation of an effective policy development, coordination, and monitoring capability in the Office of Management and Budget (OMB) to support expanded presidential leadership in civil rights enforcement.[12]

The Carter administration placed a relatively high priority on addressing such concerns. Its Reorganization Project, centered in OMB, considered options for better coordination, monitoring, and organization of civil rights policy generally, and of enforcement of equal employment opportunity, fair housing, and nondiscrimination in federal financial assistance programs, in particular. After several years of declining organizational visibility for civil rights within OMB, for example, the Carter team created an Assistant Director for Civil Rights, with responsibility for increasing sensitivity to civil rights concerns within OMB's regular budget, legislative review, and program evaluation processes and for improving presentation and assessment of civil rights enforcement information provided to OMB by the agencies. One aspect of this effort was continued refinement of *Special Analysis J* ("Civil Rights Activities"), part of OMB's annual budget presentation that consolidated and discussed civil rights performance and budget data.[13]

Through Reorganization Plan No. 1 of 1978[14] and its implementing Executive Orders, the Carter administration consolidated the contract compliance program (with associated resource authorizations) from the scattered agencies into an expanded Office of Federal Contract Compliance Programs (OFCCP) within the Department of Labor,[15] transferred enforcement of the Equal Pay Act and the Age Discrimination in Employment Act from the Department of Labor to EEOC,[16] and assigned primary responsibility for coordination of equal employment policy development and enforcement to EEOC.[17]

The Reorganization Project also asserted greater authority for the Department of Housing and Urban Development (HUD) to improve coordination of federal efforts to combat housing discrimination.[18] More broadly, President Carter issued Executive Order 12250, assigning significantly enhanced authority and responsibility to the Department of Justice for coordinating enforcement policy and operations under Title VI and under the related prohibitions of Title IX of the Education Amendments of 1972 (sex discrimination in federally assisted education programs), Section 504 of the Rehabilitation Act of 1973 (handicap discrimination in federally conducted and assisted programs), and various similar program-specific provisions.[19] (Coordination of enforcement of the similar prohibition in the Age Discrimination Act of 1975 against unreasonable age discrimination in federally assisted programs rests by statute with the Department of Health and Human Services (HHS), successor to the Department of Health, Education and Welfare.)[20] Late in 1980, the Justice Department developed an Implementation Plan stressing the need for all affected agencies to issue comprehensive and compatible regulations and standards for enforcing these prohibitions.[21]

As the Carter administration drew to a close, then, the federal government had created a framework for greater coordination and coherence in civil rights enforcement policy development and operations. In a brief 1981 report, the U.S. Commission on Civil Rights called on the new administration to reinforce and extend these positive developments by appointing a civil rights policy advisor to the White House staff, strengthening OMB's staff and responsibilities, using the full array of enforcement sanctions (including fund termination, if necessary), and increasing representation of women and minority men in senior positions.[22] The balance of this chapter considers how the Reagan administration approached these problems of policy development, coordination, and monitoring and identifies some major issues facing the new administration taking office in 1989.

II. The Reagan Administration

Sharp controversy has marked civil rights enforcement policy in the Reagan administration. The president himself has not played a major visible role in this area, delegating policy development largely to the Justice Department (in consultation with the Cabinet Council on Legal Policy). This arrangement has produced perhaps the most clearly stated "philosophy" of civil rights of any administration, but, at the same time, it has not ensured that the administration "spoke with one voice" on key issues. As other chapters of this report demonstrate, the substance of the administration's basic policy has been only partly supported by federal courts, Congress, and enforcement agencies. Further, its determination to reverse policy direction through enforcement actions and through co-optation of the U.S. Commission on Civil Rights alienated and reinvigorated "traditional" civil rights organizations, effectively eliminated the Commission from the policy scene, and stimulated greater congressional oversight of enforcement agencies.

Delay in appointing key civil rights officials (particularly the new Assistant Attorney General for Civil Rights), budget priorities hostile to programs serving many members of protected classes, and rhetorical pronouncements of administration members and friends created real anxiety in 1981-82 over likely civil rights policies.[23] Concrete steps, such as the Attorney General's May 1981 speech stressing enforcement policy based on intentional discrimination and "color-blind" remedies limited to individual victims, rescission of the pending revised guidelines for the contract compliance program, and the policy reversal in the *Bob Jones* case (that left the administration in the position of supporting tax exemptions for segregated private schools), created a perception that the Reagan administration not only would not support strengthening federal civil rights protections but would seek to "roll back" those existing in 1981.[24] The "fairness issue" jelled by mid-1982 and was never successfully put to rest by the administration. Indeed, it could not have been, for, despite White House reactions, the issue was not whether the president, personally, was a "racist," but the direction and effects of his administration's enforcement policies.[25] With the president defensive, when involved; the Justice Department crusading to "restore" its interpretation of the original meaning of the civil rights movement and the 14th Amendment;[26] the Commission on Civil Rights moving from watchful to critical to besieged, and the civil rights groups and their congressional allies alarmed and embattled, the (arguable) opportunity for a constructive debate on the future of civil rights enforcement passed.

Despite the policy leadership role of the Justice Department, confusion about Reagan Administration positions on key issues has not been unusual. Such uncertainty largely reflected conflict within the administration on specific issues and cases. The Heritage Foundation, for example, complained that White House staff, courting minority businessmen, produced statements supporting set-aside programs while the Justice Department was opposing them in Dade County, Florida.[27] The administration failed to develop a timely position on House action on extension of the Voting Rights Act in 1982, in part because of White House-Justice Department differences.[28] Businessmen complained, to Civil Rights Commission staff, among others, that too many spokesmen with different messages were confusing the business community about the administration's intent to enforce the contract compliance requirements and about the actual standards of compliance that must be met.[29] Outright policy conflict between Justice and EEOC and between Justice and OFCCP made it clear these were problems of reality, not just perception.[30] The former Secretary of Education reported disagreements with the Justice Department over the appropriate position for the U.S. in key Title IX cases.[31] The administration's apparent support for a legislative reversal of its victory in *Grove City v. Bell* offers another example of self-created confusion.[32] Additional examples can be found in the Justice-HUD differences in developing clear-cut administration positions for amendment of the Fair Housing Act[33] and in changing positions on coverage of AIDS under the nondiscrimination provisions of the Rehabilitation Act.[34] Though the fundamental ideological stance of the administration against race-conscious remedies--the centerpiece of its civil rights policy--was evident in 1981, the course of specific policy development was not so smooth.[35]

The Office of Management and Budget played an important role in overall management of federal civil rights enforcement during the Reagan administration, though it was not the role the Commission on Civil Rights had envisioned. Rather than strengthening the specialized civil rights staff, after 1982 OMB downgraded the staff and moved it from the director's office to the general counsel's office. As of 1988, no separate civil rights policy staff person is mentioned in OMB's telephone listing. Similarly, despite the central importance of budgetary policy in the Reagan administration, *Special Analysis J* became less and less useful; the civil rights data review was not published in the budget documents after fiscal 1987. Tracing the civil rights impact of OMB's policies and procedures on regulatory reform and paperwork data collection would require substantial additional research. It is clear, however, that such clearance requirements have delayed some civil rights rule-making[36] and controversies over basic data collection arose between OMB and EEOC, OMB and HUD, and OMB and HHS.[37]

Inaction, as well as action, has undermined enforcement by eliminating important information. In 1984, with OMB acquiescence--if not encouragement--the Office of Personnel Management (OPM) failed to seek renewal of the form (Form 1386) used to collect racial, sex, and national origin data on external job applicants, and in 1986 OPM canceled it altogether. Other regulatory provisions (*e.g.*, the Uniform Guidelines on Employee Selection Procedures) require collection of applicant flow data for monitoring agency equal employment opportunity performance. Without periodic OMB approval, however, such information cannot be collected.[38]

In the absence of continuing, even if flawed, budget and performance data from OMB, it is difficult to assess the budgetary status of civil rights enforcement as the Reagan administration comes to an end. Reviewing funding and proposals from fiscal year 1980 through fiscal year 1984 for six key enforcement agencies, the U.S.Commission on Civil Rights found significant reductions in funds, staff, or both, when controlling roughly for inflation. It concluded the lost resources were not compensated for by management and productivity improvements, particularly where responsibilities had grown.[39] A more recent review for some of these agencies terms funding for EEOC and the Civil Rights Division's Employment Litigation Section "stable" between 1980 and 1988, while noting that OFCCP has suffered "significant" resource reductions during that time.[40] A study of data across all enforcement agencies for the period 1971-1985 indicates that the constant dollar allocation of funds for civil rights enforcement was generally stable from 1974 to 1981 and then dropped to a plateau about 20 percent lower for the first Reagan term.[41]

Such trends are revealing only in the context of detailed information about agency operations and performance. It is clear there has been no major infusion of funding to support enforcement in the last several administrations. Enforcement activities tend to be highly labor-intensive. Staff salaries and benefits account for the major part (about 70 percent) of enforcement agencies' budgets. Travel also can be an expensive component, if staff conduct site visits for compliance reviews and technical assistance or field research to support litigation. Time and experience do not necessarily reduce enforcement costs. More complex cases can require larger litigation teams and greater investment in computer technology and social science research skills. Enforcement success can lead to greater attention to industrial or recipient sectors with fewer resources to comply without enforcement action or technical assistance. More effective outreach can increase caseloads. Management improvements and staff training may improve productivity figures; whether they also improve efficiency and effectiveness of civil rights enforcement is an open question.[42] An even more fundamental problem is the continuing absence of established performance measures for evaluating the effectiveness of civil rights enforcement. This problem is not unique to this field, but the lack of progress in addressing it represents a missed leadership opportunity, particularly for OMB and the Commission on Civil Rights.

The Reagan administration, building upon foundations laid in the Nixon-Ford and Carter administrations, has increased the capability for centralized management of policy (and, to a lesser extent, operations) in any field in which the White House desires to concentrate. Establishment of tighter controls over agency budgets, legislative activities, and data collection and development of the regulatory clearance process[43] provide an integrated arsenal of central management weapons. These can be used, as noted above, to impede, as well as advance, civil rights. Similarly, the presidency itself still offers the best "pulpit" in government, the one office to which attention must be given. Though President Reagan chose not to do so, a president has an unequaled opportunity to provide moral leadership on public issues, including, for example, explaining to a new generation the need for, and legitimacy of, a vigorous federal civil rights enforcement effort.

III. Enforcement Coordination

As discussed above, coordination of enforcement policies and standards is important in eliminating duplication of enforcement action and multiplication of compliance standards. It also helps ensure compatible, if not uniform, willingness to take enforcement action, and, over time, should save enforcers and compliers time, money, and effort. The Reagan administration began with a clear coordination framework in place. Its record in utilizing that framework has been uneven.

Although HUD's lead role under Title VIII (the Fair Housing Act)[44] was strengthened by Executive Order 12259, until very recently, HUD has shown no discernible interest in developing implementing regulations.[45] In 1983, the then Assistant Secretary for Fair Housing and Equal Opportunity wrote to Civil Rights Commission staff that the appropriate time to develop such regulations would come after enactment of amendments to Title VIII.[46] Since Congress passed the Fair Housing Amendments in 1988,[47] perhaps HUD will soon implement this responsibility.

The intensity of the dogged conflict between the Reagan administration and "traditional" civil rights forces helps illuminate the question of whether the Commission has a useful future

The Department of Health and Human Services (HHS) has been almost as laggard in carrying out its coordination responsibilities under the Age Discrimination Act of 1975.[48] With few resources to make its views stick, coordination, largely a matter of ensuring comparable regulatory development among affected agencies, has not been a high priority. The government-wide regulations on which agencies are to base their proposals were published finally in June 1979. In one instance, the Justice Department's proposed age discrimination regulations languished in "review" at HHS from November 1980 until July 1984; the low priority must be shared, for Justice did not submit the draft final regulations until August 1987.[49]

Coordination efforts have been more evident at EEOC and the Coordination and Review Section of the Civil Rights Division, where, as discussed above, the broadest authority and responsibilities are lodged. Nevertheless, priority and policy conflicts and procedural complexities, associated with the added layer of OMB review, tend to limit the scope and effectiveness of both

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agencies' regulatory coordination.[50] The Section has, in recent years, concentrated its efforts on prodding federal agencies to adopt its prototype regulations for non-discrimination on the basis of handicap in federally-conducted programs, and the Assistant Attorney General reported that over ninety agencies were well along in the rule-making process.[51] The Section also has reviewed agencies' proposed regulations for federally-assisted programs, provided technical assistance for civil rights units' planning activities, and responded to requests for advice on handling particular complaints.[52] Its access to detailed information on agency operations creates an opportunity for more systematic assessment of civil rights enforcement problems and potential, but its institutional setting (and resource constraints) create no incentives for developing such a capability.

Coordination of equal employment enforcement by EEOC continues to deliver less than hoped when the Reorganization Plan was implemented. One of the major interagency efforts has been the joint EEOC-Justice Department arrangement for referring individual employment discrimination complaints pursuant to the federal financial assistance laws to EEOC for processing.[53] But EEOC's authority for supervising equal employment opportunity for federal employees, and, in particular, its requirements for affirmative action plans, have been undermined by Justice Department refusal to cooperate, on the grounds that its own goals and timetables might somehow be transformed into quotas.[54] EEOC seems to lack confidence in its ability to exercise policy leadership when conflicts with the Justice Department arise[55] and appears not to have taken its case to the White House, as contemplated by Executive Order 12067. Given the Department's control over litigation against state and local employers and its relative political strength within the Reagan administration, this approach might be realistic in the short run. Authority conceded in this context, however, may never be retrievable.

Coordination problems naturally arise when different entities share responsibility, authority, and jurisdiction. It probably also is natural that agencies will pursue most vigorously their primary missions and not their coordination functions. That is why executive leadership must create incentives for operating agencies to increase the priority, resources, and visibility of their coordination activities.

IV. The Lingering Death of the U.S. Commission on Civil Rights

A struggle for control of the U.S. Commission on Civil Rights has been a continuing feature of civil rights developments during the Reagan years. After a series of ups and downs since 1982, in mid-1988 the (Civil Rights Commission) may best be compared to the comatose victim of multiple assaults, sustained now by external infusions of the minimal resources necessary to avoid outright death. This outcome reveals the intensity of the dogged conflict between the Reagan administration and "traditional" civil rights forces and helps illuminate the question of whether the Commission has a useful future.

Originally authorized by the Civil Rights Act of 1957 for two years, the Commission's life was extended, and its jurisdiction sometimes modified, at two to five years intervals thereafter.[56] After twenty-five years, it was a "temporary" agency with a career civil service staff of about 215 supporting a full-time staff director and six part-time commissioners appointed by the president and confirmed by the Senate. Its initial function of investigating complaints of deprivation of voting rights had long since given way to conducting more generalized research on current or potential civil rights problems; evaluating the enforcement activities of the federal government and, to a lesser extent, of state governments; publicizing (through formal hearings, publications, State Advisory Committee activities in the fifty states and the District of Columbia and other means) problems and opportunities affecting matters within its jurisdiction; and acting variously as a "conscience," reminding the nation of its history and the contemporary challenge of achieving equality, and a "gadfly," seeking to spur more vigorous action to protect and enhance civil rights.[57]

The Commission considered itself, and was usually described as, an "independent" agency, meaning that it reported to both the president and Congress, but took policy direction from neither, and spoke only for itself. Practically, this meant that the Commission did not clear its specific research activities (other than some data collection), publications, or testimony through OMB's executive branch clearance procedures (though it was subject to the executive budgetary process), or seek to achieve the objectives of successive administrations. As the agency evolved, commissioners were not expected routinely to leave office with a change of administrations. With occasional exceptions, the commissioners and top staff generally held themselves at arm's length from every administration, a distance facilitated, no doubt, by the agency's habit of freely criticizing each administration's performance, particularly in the enforcement area. The Commission's membership was bipartisan by statute and its decisions bipartisan by custom and practice. Its operating style, particularly under Chairman Arthur S. Flemming (1973-82), was deliberative; votes generally reflected substantial consensus rather than persistent division.

In light of its subject matter, its reauthorization record, its institutional independence, and the concerns and experiences of its members, the Commission also believed it had a special obligation to protect the civil rights gains of the post-World War II era and to help secure genuine "equal protection of the laws," particularly in the face of any faltering of commitment that might be analogized to the end of Reconstruction after the Civil War.[58] From the mid-1970s on, the Commission sought to clarify the meaning of institutionalized civil rights in its less familiar and, perhaps, more intrusive post-legislative phase, to weigh progress against persistent problems and inequalities, to place in a broader perspective (or, discount) social costs incurred for the social benefits to be won from compliance with a broad interpretation of civil rights laws, and to keep the spotlight on constitutional values.[59] In the context of public and political controversies of the 1970s and 1980s, the Commission staunchly defended the use of busing as an appropriate remedy to overcome particular school segregation problems and of various affirmative action programs, including employment and admissions "goals and timetables" and business set-asides. The Commission also strongly supported adoption of the Equal Rights Amendment.[60]

Increasing the technical quality and timeliness of work products, streamlining and tightening program management accountability, and making maximum use of the agency's institutional leverage were repeated themes of Commission program planning sessions in the late 1970s. These considerations led to shifting the emphasis of enforcement oversight (and some program review) from longer-term research studies to shorter-term policy and "incident" analysis keyed to achieving specified program objectives (also called enforcement or program "monitoring"). Following up on the major enforcement studies of the mid-1970s and anticipating the evolution of management problems, program plans developed during the Carter administration identified issues related to executive direction and oversight of enforcement policy and operations as a major focus of this monitoring activity. As a result, the Commission and its staff became more deeply involved in analyzing (and criticizing) federal policies and activities concerning regulatory and legislative development, budgets and other resource allocation decisions, appointments to major government positions, inter-agency relationships, litigation strategy, and so on.

In short, by 1983, the Commission had well-defined positions at variance with the views of the Reagan administration on a variety of controversial public policy issues. At bottom, there was a fundamental difference of interpretation and philosophy concerning the nature of discrimination and the necessary and appropriate remedies for it. The Commission also was assertive in commenting on current policy and administrative developments, which sometimes led to sharp disagreements with the administration (*e.g.*, an extensive 1981-83 interagency correspondence, punctuated by several public statements, on the Justice Department's position in a series of cases challenging Title IX enforcement; a series of reports questioning administration budget policies affecting civil rights enforcement and education programs, in particular; public dissatisfaction with the pace of appointments of women and minority men to major administration positions).[61]

By 1984, however, the administration won (at least temporary) control of the Commission through appointments in the wake of the necessary reauthorization of the agency. Efforts in 1981-83 to replace a majority of the commissioners succeeded in appointment only of a new chairman and one commissioner and recess appointment of a new staff director. The administration was publicly embarrassed by the questionable quality of two proposed appointees and twice frustrated by lack of Senate action on confirmation of groups of three nominees intended to replace three "liberal" commissioners.[62] In

October 1983, as the House and Senate considered reauthorization, including alternative means of ensuring its independence), the agency's authorization expired, the staff began to close the Commission. The president fired the three commissioners he was seeking to replace through appointments. (Two were reinstated after a lawsuit and thereby restored a quorum, allowing the Commission to complete its statutory responsibility to issue a "final" report.)[63]

After several compromises failed, and with Congress moving toward adjournment, a "deal" was reached restructuring appointment of commissioners and expanding the Commission to eight members. As described by the civil rights representatives involved in the negotiations, acceptance of the compromise depended on appointment of specific individuals (including incumbents), a majority of whom would be likely to maintain existing policy on major issues.[64] According to a neutral observer, after Congress adjourned, although neither of the key Republican senators involved in negotiating the compromise disputed its reported details, the White House said there was no deal.[65] The president signed the legislation, but neither he nor the House Republican leadership followed through on the appointments deal. As a result, the "new" Commission had a majority of five (sometimes six) "in tune" with administration policy views and willing to concur in reappointment of the chairman and staff director. This series of events, and the unconcealed pleasure of these two senior officials at having prevailed over the "civil rights industry" undoubtedly contributed to the subsequent rancor within, and surrounding, the Commission.

The United States Commission on Civil Rights Act of 1983[66] essentially retained the Commission's previously authorized powers and responsibilities for six years (until November 30, 1989), but dramatically changed the selection and tenure of commissioners. The president and Congress (through the leadership of each chamber) each appoint four members-- apportioned to avoid domination by members of either political party-- to specific terms. Half of each group of appointees were appointed to three-year and half to six-year terms.[67] (This arrangement could create regular staggering in membership in a permanent or long-term body, but with the authorization limit of six years, it simply confuses matters.) The law authorizes the president to appoint a staff director with the concurrence of a majority of the Commission, no longer requiring Senate confirmation.[68] The Justice Department questioned the constitutionality of this hybrid, but the president accepted it, and it has not been formally challenged.[69]

At its first meeting in January 1984, the "reconstituted" Commission declared its independence from the Reagan administration and from the "old" Commission's policies (though it did not disavow them wholesale) and completely revamped the agency's program. (The commissioners decided, for example, that budgetary support was not an appropriate question for Commission research, except in the context of enforcement. A project on minority student access to financial aid programs, therefore, was replaced by a study of the effects of affirmative action on higher education.) The Commission also issued a statement criticizing the Supreme Court's acceptance of a lower court's affirmative action relief in the Detroit police case.[70] This meeting set the tone for much of what followed. Perusal of Commission meeting agendas and transcripts, or more readily available sources such as the *New York Times Index*, for the next several years shows a preoccupation with combatting affirmative remedies of all sorts, contentious meetings, unilateral position-taking, and abandonment of any semblance of deliberation. These characteristics of the personal style of the then-Chairman, the late Clarence M. Pendleton, Jr., were widely noted, but, in fact, the behavior of the Commission as a body can be described in similar terms.[71]

The role of career program managers in advising the Commissioners was severely curtailed. Indeed, at least one new Commissioner refused even to exchange pleasantries with career executive staff. Battle lines were so sharply drawn and relations so embittered between the ideological majority and holdover minority, that the newer Commissioners either discounted warnings that the Staff Director frequently did not respect routine operating procedures or felt that ideological loyalty precluded exercising meaningful oversight of the agency's management. Internal program planning became detached from staffing and budgetary considerations; professional staff reviews critical of favored projects were either ignored, rejected as ideologically motivated, or precluded by avoidance of traditional review procedures. These problems were compounded by an influx of new employees, some in very senior positions, who lacked experience in research on civil rights, in the peculiar problems of conducting research in a government agency, or both. The implications of program decisions were rarely, if ever, discussed; in shifting resources away from programs managed by career staff to those managed by noncareer staff, for example, the Commissioners were also seriously undermining the program and enforcement monitoring activities they continued to claim as a centerpiece of the agency's program. (They seemed puzzled by later criticism of this result.) The "reconstituted" staff did not serve the commissioners well, but the commissioners did not insist that they do so. Their lack of control and inadequate information on program operations and management were exacerbated by turnover in top staff positions. When the Commission's management and diminished productivity came under sharp congressional scrutiny, the commissioners were unable to mount an effective defense.

The conflict on the Commission drew not only substantial media attention but greatly enhanced monitoring by civil rights groups and Congress. A staff member from the House Judiciary Subcommittee on Civil and Constitutional Rights became a regular meeting attendee, as did, for example, staff representatives of the Leadership Conference on Civil Rights and the NAACP Legal Defense Fund, Inc. (both of whom happened to be former Commission employees). Thus, more than at any other time, the Commission suddenly became subject to intense and knowledgeable oversight. Certainly, these observers were not neutral, but their concerns about the focus and integrity of the Commission and its policy independence from the administration were reinforced by their ability to interpret events (and nonevents) evident in Commission meetings (*e.g.*, submission of staff-drafted comments on proposed changes in Voting Rights Act guidelines as personal comments of the chairman; the shifting of project reports from the "statutory" to the "clearinghouse" category; redefinition of State Advisory Committee reports as "briefing memoranda"; elimination of office-level staff allocations; submission of project proposals and designs lacking budget and staffing information; nonparticipation of executive staff members in discussion of matters in their purview). Indeed, the observers may well have understood the implications of such seemingly arcane matters better than the commissioners: the general import of these random examples is limiting the information available to the commissioners and reducing their role in program and policy decisions.

After the president "effectively seized control" of the Commission,[72] the civil rights forces counter-attacked through congressional legislative committees' authorization and oversight activities, including a General Accounting Office (GAO) audit,[73] and increased House and Senate Appropriations Subcommittees' controls on the Commission's budget.[74] Despite strenuous Commission objections (supported by the administration), following an unsuccessful attempt to control spending by "ear-marking" the fiscal year 1986 appropriation to the Commission's traditional budget activities, the fiscal year 1987 and subsequent appropriations were sharply reduced, with tight restrictions imposed on certain categories of spending.[75] Ironically, one effect of this "counter coup" has been to relieve the "reconstituted" Commission of the necessity for making good on the major program changes of 1984-85. For the last two years, the administration has proposed funding the Commission at $9.8 million and $13.4 million. The House, however, has defunded the Commission altogether, while the Senate committee has kept it alive at a subsistence level, with controls limiting use of consultants and contractors, commissioners' time and personal staff, and noncareer employees, and setting requirements for spending specified amounts on enforcement monitoring and regional operations.[76] As a result, the Commission's appropriation has dropped from its fiscal year 1986 level of $11.7 million to $7.5 million in fiscal year 1987 and to $5.71 million in fiscal year 1988 and fiscal year 1989.[77] These funding cuts have substantially reduced staff, especially veteran career staff, including those assigned to program activity.[78]

The Commission is but a shadow of its former self,[79] barely able to mount program activity sufficient to justify monthly meetings. It has issued four reports, based on projects begun during headier days, during each of the last two fiscal years.[80] It has conducted only limited hearings, and, increasingly, its program activity consists of receiving "briefings" from outside persons and organizations.[81] The fifty-one State Advisory Committees (SAC) required by statute are supported by a sharply reduced regional staff operating from offices in Washington, Kansas City, and Los Angeles. Most reported regional activities are "planning meetings" or community forums, and few

SAC reports are issued.[82] While Congress requires that a certain amount be spent for "civil rights monitoring," it appears that "monitoring" has been redefined to mean reporting on all civil rights-related current events, instead of the more systematic enforcement and program oversight previously associated with the term.[83] Nationally, the Commission has dropped off the screen. Its value and its future are much in doubt.

The Commission is but a shadow of its former self, barely able to mount program activity sufficient to justify monthly meetings.

V. Congressional Oversight

As the political struggle over control of the Commission drew the appropriations subcommittees and the House legislative subcommittee into closer oversight of the Commission itself, so too, the decline in the Commission's civil rights enforcement monitoring contributed to a substantial increase in Congressional oversight of civil rights enforcement agencies and issues. The Subcommittee on Employment Opportunities of the House Education and Labor Committee has been especially active monitoring EEOC operations and policy development, to the clear displeasure of its chairman.[84] The House Government Operations Subcommittee on Employment and Housing also conducted oversight hearings on EEOC.[85] Its Subcommittee on Intergovernmental Relations and Human Resources has closely tracked the Educational Department (ED) Office for Civil Rights.[86] Among others, the House Select Committee on Aging also has looked at civil rights enforcement.[87] GAO oversight appears to have increased.[88] Civil rights enforcement issues also were central in the legislative struggles culminating in the Civil Rights Restoration Act of 1988 and the Fair Housing Amendments of 1988 and in the 1985 Senate Judiciary Committee confirmation hearings on appointment of Assistant Attorney General William Bradford Reynolds to be Associate Attorney General.

In some respects, increased congressional oversight of civil rights enforcement may be seen as a positive development. In the context of announced administration commitment to revise major enforcement policies and reduce the regulatory impact of the federal government, additional enforcement monitoring seems highly indicated. Legislative oversight requires agencies to justify their policies and operations. Oversight hearings and studies also can be helpful in educating members of Congress about the accomplishments and needs associated with civil rights enforcement, education that can be very useful when agencies seek reauthorization and appropriations. Generally, however, oversight is likely to be a lower priority for committees than program reauthorizations, new legislation, confirmations, and appropriations. Hearings can be very important in publicizing problems, but they are not necessarily the most productive format for evaluating enforcement processes or exploring alternatives. Oversight can be sporadic, lacking in continuity and perspective, and divert committees from broader policy issues. Certainly, legislative oversight cannot be an effective substitute for clear executive direction of enforcement, and it can only partially substitute for systematic monitoring of the type the Commission, at its best, did.

VI. Looking Ahead

As a new administration comes into office in January 1989, it faces a challenge, and an opportunity, to restore confidence in federal leadership in civil rights enforcement. There is a positive role for state and local enforcement efforts, operating in tandem with and separately from federal activity. Ultimately, the effectiveness of laws rests, in large measure, on voluntary compliance. Yet the federal government has an essential role, based in historical circumstances and in the concept of national citizenship, both in positively securing federally protected civil rights and in setting a tone and example that encourages respect and compliance. The new administration can recognize the corrosive effects of the discord and distrust of the last eight years and seek to restore greater civility and openness to debate. The new administration can take a number of positive steps to create an agenda to improve civil rights enforcement.

A. Presidential Leadership

The president should reaffirm the fundamental commitment of the United States Government to achievement of genuine equality. He should recognize the need for continuing personal attention to this objective and seek opportunities to demonstrate in deed as well as word his understanding of the gap between the promise and the reality of equality and the positive role his administration can play in eliminating that gap. In particular, the new president can take care in making appointments to ensure that lower-level appointees share his perceptions and commitment; he can expressly include strengthened civil rights enforcement in the broad themes and priorities of his administration, and he can reach out to make his administration more representative of the population. Key enforcement agencies need top-quality leadership: HUD, for example, must move quickly to create the administrative and regulatory structure and secure the resources to enforce the new Fair Housing law; the Assistant Secretary for Civil Rights at the Department of Education, especially, must lead in enforcing the expanded requirements of the Civil Rights Restoration Act and in managing resources and strategy free of its court-mandated timeframes for processing and resolving complaints;[89] the Office of Federal Contract Compliance Programs of the Department of Labor needs stable, strong leadership. Appointments to such posts are critical for ensuring effective and coherent enforcement.

The president also must build into his advisory structure some means of assessing enforcement needs and problems on a government-wide basis. Properly-supported staff in the White House or at OMB can be a critical investment for improving executive direction of civil rights enforcement. A high priority for such a staff group is improving the availability of information for evaluating the need for and effectiveness of civil rights enforcement. Whether *Special Analysis J* ("Civil Rights Activities") is resurrected and refined or some other format is developed, better information is essential for overall management of enforcement. Another early task is managing policy review and development in areas identified in this report as critical.

B. Resources

Though there are some differences among particular agencies, generally speaking, resources available for civil rights enforcement have remained stable or declined in real terms. Work-sharing agreements shift some of the enforcement burden to state and local governments, but there are very real limits to such an approach. Civil rights enforcement, like other law enforcement programs, is labor intensive. While savings may be realized through productivity improvements, those improvements also have a price tag. Staff training, education and other outreach programs to victims of discrimination, information and technical assistance programs to support voluntary compliance, improved coordination of compliance standards and staff operating procedures, improved collection and analysis of enforcement-related information--such efforts to support greater productivity require an investment of financial resources and management energy.[90] As noted above, there also will be costs associated with enforcement of two major new laws and, perhaps, other new policies (*e.g.*, coverage of AIDS victims under Section 504), improving the scope and quality of enforcement coordination, and exploring alternative approaches to civil rights enforcement.

C. Enforcement Coordination

For reasons discussed above, coordinating enforcement across agencies will continue to be a key organizational and policy challenge. Institutional consolidation may sometimes be appropriate, as (most observers probably would agree) in the case of the contract compliance program, but as that case also shows, consolidation is not a quick or cheap fix. Creating an effective new enforcement agency takes years and substantial political, managerial, and financial investment. Unless the potential benefits are clear and convincing, those resources probably are more wisely invested in strengthening coordination. One central problem in improving coordination is eliciting lead agency commitment to the task. Coordination agencies have other things to do that are more pressing, more rewarding, and/or more readily accomplished. White House and congressional incentives and oversight can increase the priority attached to coordination responsibilities by agencies such as HUD and HHS. Another problem is that lead agencies generally lack authority to enforce their coordination policies. Denying clearances to new regulations is a common, but rather self-defeating, coordination mechanism. Policy conflict may paralyze needed regulatory development or enforcement actions, and there usually are strong disincentives for taking conflicts to the president. A more visible White House staff function might be able to assist with firm, though informal, resolution of such conflicts. The framework created through the 1978-80 executive orders has improved enforcement coordination, but there is real need to explore the value of its further elaboration.

D. Monitoring and Oversight

Just as the number of agencies with enforcement responsibilities and variety of those protections and remedies require coordination, the decentralization of enforcement activity and the special Federal responsibility for civil rights enforcement require a self-conscious monitoring and oversight capability. There are different ways to institutionalize this function. Congress and its support agencies, for example, have played an increasingly important role in overseeing civil rights enforcement in recent years. While it is unlikely that many executive branch officials would applaud this development, oversight of many other policy areas is left to Congress. The characteristics of legislative oversight, however, limit its usefulness to the White House as a management information and assessment tool. A monitoring and evaluation staff in the Executive Office of the President (EOP) could serve White House needs more directly, though such staff may either get caught up in the press of events or be dismissed as irrelevant. So presidentially-oriented a staff may also lack credibility outside the White House. To the extent that civil rights enforcement issues are seen as internal administration matters, an EOP location for an oversight unit, linked to the policy advisory staff, probably makes the most sense. If, however, these matters are viewed in a broader dimension, then a monitoring function independent of White House policy control with access to executive agency information makes more sense--*i.e.*, a re-reconstituted Commission on Civil Rights.

E. Future of the U.S. Commission on Civil Rights

Authorization of the Commission will expire on November 30, 1989, so the new administration must address this question very soon. Several different issues must be considered, but it is clear the Commission currently lacks institutional credibility, the resources to conduct an effective program, a clear sense of mission and priorities, a reliable institutional or political constituency, and independence. It is difficult to justify its continued existence except on grounds that it is worth $6 million each year to members of Congress to avoid a record vote to eliminate it. At the same time, it is also clear that there are useful and important functions for a revitalized Commission.

A credible Commission can symbolize institutionally a continuing nonpartisan national commitment to deliver on the promise of equality. It can help sustain attention and create expectations within government and within the broader society concerning the need to secure civil rights. It can collect and disseminate information about matters affecting equal protection across issue areas and institutional lines. It can serve as an independent monitor and source of information to the public, the president, and Congress on the state of civil rights enforcement policies and operations. It can evaluate, and sponsor intra-governmental consideration of the effectiveness of alternative discrimination remedies, performance measures, and enforcement approaches. It can conduct and sponsor research on a wide range of issues related to equality in America, including the persistent socio-economic disparities that create and reflect *de facto* inequality.[91]

A key question, then, is, what characteristics are necessary to create an effective, credible Commission? Independence from policy and operational control is the minimum criterion. The issue of independence easily can be confused.[92] The former Chairman of the "reconstituted" Commission frequently argued that the "old" (pre-1984) Commission was *not* independent because it was philosophically linked with the "traditional" civil rights groups, while the "new" agency was truly independent because it did not take policy direction from the White House, Congress, or the "civil rights community." Indeed, the destruction of the Commission's independence, in this view, came precisely from those groups and their congressional allies. While he was certainly correct that the appropriations restrictions and strict oversight interfere with the Commission's operational independence, and it seems unlikely that anyone in the White House ordered particular policy choices, it is also true that after the 1983 crisis, Commission policy tracked closely with administration policy. That, after all, was the point of the struggle. The Chairman and top staff (and perhaps other commissioners) certainly maintained very close contact with the Civil Rights Division on policy matters. Former Staff Director Linda Chavez attended White House-sponsored personnel management training for new members of the administration. In 1984, the Heritage Foundation cited her as the administration's most "forceful" opponent of comparable worth and a key administration opponent of the Civil Rights Restoration Act, legislation designed to overturn *Grove City*; she, also, recently referred to herself as part of the Reagan administration during her employment at the Commission.[93] Perhaps the Commission did not "take policy direction" from the White House, but its two most powerful and visible leaders identified themselves with the administration and its objective of reversing established civil rights policy. Their actions certainly compromised the agency's reputation for independence.

Appointment of four commissioners and the staff director solely by the president (particularly by one president, as was the case in 1983-84 and presumably would be again, if the existing legislation were simply extended in 1989) almost guarantees a "presidential" Commission. The four "congressional" appointees are appointed, in fact, by four different leaders, divided between the majority and minority parties in each house. Unless the president is totally devoid of influence with his party's congressional leadership, if he wants to ensure an "ideological" majority, he should be able to arrange at least a fifth vote on key policy issues.[94]

It is, in the end, hard to resist the conclusion that the agency's independence would be better secured by returning to president-and-Senate appointments, with removal for cause, for the commissioners. A staff director appointed by the president should receive Senate confirmation as well. (The Commissioners might appoint the Staff Director,[95] though they have no institutional basis for managing a search and selection.) Other tenure characteristics depend on the extent of the agency's authorization. Staggered terms make sense only in a long-term body, which, indeed, the Reagan administration was willing to support at one point in 1983.

The lingering question is whether it is reasonable to believe a newly-authorized Commission could overcome the legacy of the last five years of turmoil, a new administration would agree to reinstitutionalize an independent critic, and the Congressional overseers and civil rights groups would back off. The possibility of restoring sufficient credibility to enable the Commission to begin again rests on development of a broad political consensus about its value and mission. The Commission has begun a series of meetings and conferences presumably designed to tap, or perhaps create, a constituency for its 1989 reauthorization.[96] This is too important a matter, of course, to be left to the Commission.

CHAPTER V

CHANGING THE JUSTICE DEPARTMENT'S POSITION IN PENDING LITIGATION*

by Joel L. Selig

Certain actions of the Justice Department's Civil Rights Division in the Reagan administration departed radically from a long-standing, bipartisan tradition of incrementally progressive civil rights enforcement.

I. Introduction

This essay offers some thoughts on the extent to which a new administration seeking to strengthen federal civil rights enforcement may be obliged to adhere to legal positions taken by the prior administration in pending cases.

I have previously written critically on the performance of the Reagan Justice Department in the area of civil rights enforcement, with particular focus on school desegregation, affirmative action in employment, and tax exemptions for racially discriminatory schools.[1] My critique engendered a reply from Assistant Attorney General William Bradford Reynolds,[2] and I have responded to his reply.[3] I have also previously reviewed the Justice Department's fair housing enforcement program, with particular emphasis on the Carter administration's efforts to combat racially exclusionary municipal land use practices.[4]

It has been my view that certain actions of the Justice Department's Civil Rights Division in the Reagan administration departed radically from a long-standing, bipartisan tradition of incrementally progressive civil rights enforcement. My criticisms have not focused on what I consider to be legitimate differences of opinion on substantive policy issues. Rather, I have criticized the Reagan Justice Department from an administration of justice perspective, concluding that it has in many instances acted in a manner inconsistent with neutral principles of responsible law enforcement.[5]

Most of the ten principles of responsible law enforcement that I have articulated[6] are potentially relevant to decisions by a new administration to change positions taken by the prior administration in pending litigation.[7] It seems reasonable to assume that the next administration, whether Republican or Democratic, may be more favorably disposed from a policy standpoint than the Reagan administration was to progressive civil rights enforcement. It is important to reflect, therefore, on the considerations that might constrain the next administration's desire to change the government's legal positions in pending litigation. In fairness, we who have criticized the Reagan administration for its departures from principles of responsible law enforcement must be prepared to apply those principles to a new administration whose substantive policies may be more to our liking. The question that then arises is whether the application of those law enforcement principles may produce different results when what we view as a more progressive administration is rectifying what we consider the misguided course of the prior administration, as compared to when what some of us viewed as a radical administration was reversing what we considered the proper course of previous administrations -- or whether the application of those principles must produce the same results in both circumstances if they are to retain their neutrality and their vitality.

Before exploring the intricacies of this question, some preliminary points should be noted. First, although I have vigorously criticized the Reagan administration for its frequent disregard of law enforcement principles and for some of its changes of position in pending litigation,[8] I have never suggested that the principles I have articulated provide a mechanical formula for deciding what to do every time the question of a change of position is considered. Nevertheless, I do maintain that those principles should be applied fairly and dispassionately by each administration and by those advising or evaluating each administration, regardless of the policy or political preferences of the administration, its advisors, or its critics. Second, while similar situations should be resolved similarly, it is not inconsistent with neutral principles to treat differently situations that truly are distinguishable. Finally, it is important to remember that the institutional and prudential constraints I have discussed are not the only limitations on changes of position: there are legal constraints as well. It seems appropriate to begin by considering those legal constraints before discussing institutional and prudential limitations.

II. Legal Constraints

Consider a school desegregation case which has been fully tried with respect to liability and remedy, and in which the district court has refused the government's request that it order mandatory pupil reassignments to desegregate grades 1-2 at schools found to be unlawfully segregated. Suppose that in the Reagan administration the government declined, for inappropriate reasons, to appeal the district court's refusal to desegregate those grade levels.[9] Would a new administration be free to ask the court, in which the case is still pending and a regulatory injunction outstanding, to reconsider its previous decision to exclude the lower grade levels, and then appeal an unfavorable ruling? Alternatively, would the government be free to bring a new lawsuit seeking to remedy the continued segregation at those grade levels?

At the very least, it would seem that the government would face a heavy burden to overcome the argument that issue preclusion in the first scenario or claim preclusion in the second forecloses it from attempting to pursue further desegregation at those grade levels at this late date, given its previous decision to abandon the issue. The government might attempt to argue that the continued segregation at those schools is an unlawful, unconstitutional condition which a court must be free -- indeed, must be required -- to remedy by whatever means is necessary notwithstanding ordinary principles of collateral estoppel or res judicata. However, when the trial court has explicitly found that the law does *not* require a more extensive remedy at those grade levels; when there has been no higher court decision changing the applicable legal standards in the period since the court's previous decision;[10] when the court's explanation for its decision included supporting factual findings and consideration of factors relevant to the exercise of equitable remedial discretion; and when the government did not appeal the court's judgment within the time provided for an appeal, it would be extremely difficult if not impossible to escape the conclusion that the government is precluded

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from further pursuit of the issue, even if the court's unappealed decision was both legally and factually incorrect and the previous administration's decision not to appeal indefensible.

Consider another example: an employment discrimination case settled by consent decree in the Reagan administration. The decree provides various forms of relief, including a general injunction, prohibition of unvalidated testing procedures, back pay and other specific relief for identified victims of discrimination, affirmative action in the form of intensified minority recruitment efforts, but no relief in the form of quotas or goals and timetables. The government settled without quota relief because of the Reagan administration's antipathy to such relief as a matter of policy and its mistaken belief that such relief is both unlawful under Title VII of the 1964 Civil Rights Act and unconstitutional.[11] The administration's position on quota relief was wrong under the law as it existed when the consent decree was entered, and it remains wrong in the wake of recent Supreme Court decisions.[12] Assuming that the court has continuing jurisdiction under the consent decree, which is still in effect, would a new administration be free to ask the court to modify the decree to include quota remedies?

In this case again it would seem that the government would face a virtually insurmountable obstacle. The case is if anything less appealing than the school desegregation example in two respects: the government consented to the limited relief provided as part of a compromise settlement, which may place it in a less favorable position from the standpoint of equity than if it had inadvisedly failed to appeal an adverse litigated determination; and the consent decree simply provides less stringent and less effective relief than a quota decree would provide, thereby perhaps lengthening the time within which a workforce free of the effects of prior discrimination may be achieved, but in no way perpetuating continuing unlawful practices. There has been neither a change in the law nor a change in factual conditions that would require or justify modifying the consent decree and thereby releasing the government from the bargain it struck.[13] If the government is unable to identify any "change in law or facts [which] has made inequitable what was once equitable,"[14] it seems likely to be met with the following response: "[it] chose to renounce what [it] might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall."[15] Unless the consent decree expressly adopted a long-term numerical goal and a time frame within which to achieve it, so that the government could argue that experience under the decree had demonstrated that the relief would be ineffective to achieve the goal within the anticipated time period, the court would likely consider itself legally precluded from modifying the decree if the defendant does not consent. Even if the court does not consider itself without discretion in the matter, its decision against the government could certainly not be reversed as an abuse of discretion.

Thus a new administration that believes in affirmative action and quota relief as a matter of policy might find itself forced to confine its efforts to obtain such relief to new cases and pending cases in which litigated or consent decrees have not yet been entered, even if it does not consider itself so constrained in any event by prudential considerations.[16]

Other realistic examples can no doubt be hypothesized in which there are formidable and in some cases insurmountable legal limitations on the government's ability to change its position in pending litigation. Would a court allow the government to change its position in a housing discrimination case at the post-trial briefing stage so that a new administration could argue that the defendant's practices were unlawful under a theory of unjustified discriminatory effect, when the government's pre-trial brief, the pre-trial order, and the trial -- all completed in the Reagan administration -- had committed the government to the position that only practices motivated by a discriminatory purpose are unlawful, and the defendant had prepared for trial and tried the case on that basis?[17] In another case, at what point would the untimeliness of a new administration's motion for leave to amend its complaint to allege additional legal violations which the prior administration had declined to pursue strain the limits of even the liberal standard provided by Rule 15(a), Fed. R. Civ. P., or at least render immune from reversal a decision by the trial court denying leave to amend?[18] On the difficult school desegregation questions of declarations of unitariness, releases from court supervision, and approvals of revised student assignment plans that increase racial separation,[19] to what extent would a new administration be legally bound by ill-advised decisions on such matters reached under incorrect legal standards or perhaps even for improper political reasons in the prior administration, and incorporated into litigated determinations or consent decrees containing apparently binding recitals of factual findings? This last hypothetical is potentially significant in its implications, depending on what the Reagan administration does along these lines in its waning days in office.

The point of all this is that the government's ability to change its position in pending litigation is in many cases subject to legal constraints wholly apart from the institutional and prudential constraints to which this discussion will shortly turn. Of course, doctrines of procedural fairness, of finality and estoppel, and of equitable remedial discretion are not applied mechanically; rather, decisions are guided by general principles that are applied on a case-by-case basis, with room for some flexibility of judgment. There are even situations in which the government may properly be treated differently from other litigants insofar as some doctrines are concerned.[20] But there are legal limits on a new administration's ability to escape the impact of decisions taken and positions advocated during a prior administration, no matter how erroneous or even abhorrent those actions may have been.

The first and most important principle of responsible law enforcement is respect for the law

III. Institutional and Prudential Constraints

Consider now another hypothetical case in which the Reagan administration did not pursue desegregation of grades 1-2 in unlawfully segregated schools; or pursued desegregation only by voluntary means, eschewing any resort to mandatory student reassignments and busing even though some such measures were necessary to achieve the full desegregation that the law requires; or pursued desegregation only at some unlawfully segregated schools and not at others.[21] Assume that the Reagan administration's positions on these issues were inconsistent with the governing law concerning remedy and liability as declared by the Supreme Court.[22] Suppose further that, unlike in the cases discussed in the previous section, the pertinent portion of the litigation -- the remedy phase or the liability phase -- was not completed before the new administration entered office, so that the government is not legally precluded from changing its position on the matters in question. Should the government, in light of the pertinent institutional and prudential constraints, change its position or forbear from doing so?

In my view, the proper approach to this kind of question entails, if anything, more flexibility than the approach to questions concerning legal constraints such as those discussed above. It implicates difficult value judgments and calls for a balancing of various institutional and prudential considerations on a case-by-case basis. Nevertheless, I believe that the same principles of responsible law enforcement against which I have elsewhere measured the Reagan Justice Department's civil rights record are equally pertinent in the present context. The foregoing hypothetical may be analyzed as follows in terms of those ten principles.[23] (My previous exposition of those principles is reprinted as an appendix to this essay.)

The first and most important principle of responsible law enforcement is respect for the law.[24] Since the hypothetical under consideration assumes that the prior administration's position was inconsistent with the controlling case law, this principle points strongly in favor of changing the government's position.

Occasions on which one can rightly say that the Department of Justice's position has been inconsistent with the governing law as declared by the Supreme Court should be rare indeed. Unfortunately, such occasions were not so rare in the Reagan administration, particularly in the school desegregation area, where the Department refused to apply a number of Supreme Court decisions with which it disagreed.[25] There may therefore be a number of cases facing the next administration in which proper respect for the law requires a change in the government's position. In other cases, however, it may not be so clear that the prior administration was ignoring clearly defined legal mandates.

The present hypothetical may also be one in which the prior administration's position raises questions concerning a fair and proper regard for the relevant facts and circumstances.[26] The prior administration may have concluded that grades 1-2 could not be desegregated without endangering the health or safety of the students involved; that mandatory desegregation measures either were infeasible or were unnecessary because voluntary measures would achieve the necessary results; or that application of the controlling evidentiary presumptions[27] would lead to the conclusion that certain schools were not unlawfully segregated.

The prior administration's conclusions on these factual (or mixed legal and factual) questions may have been plainly erroneous, influenced by its distaste for the applicable legal standards and its policy against mandatory desegregation. On the other hand, its conclusions in any particular case may have been correct. The duty of the new administration would be to evaluate these conclusions fairly and dispassionately and to reach its own objective conclusions. If it sincerely believes that the prior administration's conclusions were clearly incorrect, then a change of position would be indicated. If it agrees with the prior factual conclusions, and if the prior position did not misapply the law, then no change would be indicated. In cases where the facts may be evaluated fairly in more than one way, appropriate humility and self-restraint[28] should also enter into the equation. In some cases self-restraint might lead the new administration to leave well enough alone if the question is close even though it might have decided the question differently as an original matter. It may be that, in a particular case, neither a more aggressive nor a less aggressive approach would be inconsistent with principles of responsible law enforcement, and the final decision would be a discretionary one that could go either way. Since certain factual issues may be more ambiguous than certain legal issues, such cases may well arise, and a new administration may be more reluctant to change the government's position in such cases.

Assuming that the prior administration's position was inconsistent with either the governing law or the relevant facts, would considerations of institutional continuity[29] and historical continuity[30] nevertheless counsel against changing the government's position? To the extent that the question involves the prior administration's refusal to apply the governing law, the answer would be negative. This would be a situation in which there really is a difference between the Reagan administration's refusal to fulfill its obligation to enforce the law and a new administration's willingness to fulfill that obligation. Although the new administration would be breaking continuity with the Reagan administration in this respect, it would also be restoring the institutional and historical continuity with previous administrations, both Republican and Democratic, that the Reagan administration had shattered. On this kind of issue -- respect for the law as declared by the Supreme Court -- it would be neither partisan nor non-neutral to conclude that considerations of institutional and historical continuity favor a change in the government's position, even though some expectations created by the prior administration may be disappointed and great care must be taken to ensure that the change is not perceived as political in nature. The situation here is to some degree analogous to a recent case in which the Supreme Court reversed itself on a Commerce Clause issue. The circumstances there were that the nine-year-old precedent which the Court overruled had itself represented a substantial break with institutional and historical continuity. The Court's recent reversal of position had the effect of restoring the continuity it had previously abandoned.[31]

To the extent that a possible reversal of position is based on a differing view of the facts of the case, considerations of institutional continuity in general and fairness to defendants in particular may weigh more heavily than if the reversal were based upon a return to the application of proper legal standards. When the prior administration's factual position was plainly erroneous or even motivated by improper considerations, the need to correct the government's position may be more important than the dangers of a break in continuity. When the question is closer, institutional continuity is an additional consideration that may point in the direction of forbearance even in the face of doubts as to the correctness of the prior administration's determination.

The application of other law enforcement principles to the present hypothetical may be discussed more briefly. It would be consistent with appropriate priorities[32] to change the government's position to accord with the governing law as applied to the pertinent facts of the hypothetical case, since the case is still in litigation and it is important that it be resolved successfully by the complete desegregation that the law requires. It would also contribute to the Department's positive public image[33] to return to a posture of proper respect for the law and regard for the facts. Care must be taken, however, in applying the public image criterion in present circumstances, because it may conflict with another relevant criterion. The public image of the Reagan Justice Department has been so impaired by a combination of unique circumstances that it may be tempting to conclude that any change in position or break with the past eight years is itself desirable. The danger, however, is that changes of position may in fact be, or may come to be perceived by the public and the courts as if they were reflexive, political, and unjustified by a careful and professional evaluation of the law and the facts. There would be no more wisdom in assuming that every position adopted by the Reagan Justice Department was incorrect than there was in what sometimes seemed like the Carter administration's assumption that every foreign policy position formulated by its predecessor was pernicious, or the Reagan administration's assumption that every Carter administration policy was inherently suspect. Reversals of position based on such unwarranted assumptions may be inconsistent with the separation from politics[34] that is an essential prerequisite of responsible law enforcement.

Proper utilization of institutional strengths[35] would include careful attention to the recommendations of experienced career attorneys on whether to change the government's position in any particular pending litigation. Such input would help place a check on any inclination of political appointees to change positions reflexively, for political purposes, or in unthinking response to interest group pressures. The importance of self-restraint[36] has already been mentioned in connection with revisiting close factual questions. In another context, where the question involves a voluntary desegregation plan offered or formulated by the prior administration, appropriate humility and self-restraint may in some cases indicate the desirability of trying such a plan as an initial step before resorting to more drastic alternatives even if there is a basis for doubting that the voluntary plan will be effective. Such judgments should be made on a case-by-case basis, and should also include consideration of the costs in disruption of first implementing a voluntary plan which subsequently will have to be replaced by a mandatory one. This kind of case-specific judgment would normally be made in any event even if no question of a change in the government's position were involved. There may be cases in which the new administration would choose to proceed with a voluntary plan proposed by the prior administration even though that particular plan might not have been the new administration's preference as an original matter. Such an approach could include a mandatory back-up that is fully formulated and available for prompt implementation or, at a minimum, a reservation of the right to press for additional relief if the voluntary plan proves insufficiently effective. In making these kinds of choices, the goal of promotion of peace[37] as opposed to discord may point toward one decision in one case and toward a different decision in another.

The school desegregation hypothetical just reviewed at length may in many circumstances be an easy one to resolve in favor of changing the government's position. Another example that may be similarly easy to resolve is the employment discrimination case discussed in the previous section, with the modification that relief had not yet been formulated during the Reagan administration either through a consent decree or through contested litigation. The government's position in pre- and post-suit negotiations might have been that a proper decree could not include any relief in the form of quotas or goals and timetables, but no settlement had been concluded and the court had not entered a litigated decree.

In this situation it would seem that the government could appropriately abandon the Reagan administration's hard-line anti-affirmative action position, which was based both on an incorrect reading of the law that the courts have clearly rejected and on an extreme and ill-advised policy.[38] A position that is willing to seek quota relief in appropriate circumstances would be far more responsive to the law and to the facts of a particular case than the prior administration's blanket refusal to seek such relief under any circumstances. As in the school desegregation example, such a change in position would restore long-term institutional and historical continuity even though it would create a discontinuity with the uniquely discontinuous approach of the Reagan administration. There would be no unfairness to a defendant in withdrawing a settlement position which was available to it under the prior administration but of which it failed to take advantage. In appropriate cases no other principle would weigh against a change of position.

There may, however, be cases in which the government would encounter difficulties either because the Reagan administration's anti-affirmative action position had been communicated to the court in connection with settlement negotiations or, in the most problematic situation, because remedy hearings had already been held, briefs filed, and the case taken under submission during that administration. In the latter case the new administration would need to file a supplemental brief explicitly changing the government's position, seeking relief different from or in addition to that previously requested, and explaining to the court why it was doing so. Additional remedy hearings might become necessary, and the government would need to persuade the court of the correctness from a legal, equitable, and remedial standpoint of its new, more stringent position. In some cases, under some circumstances, with some judges, it might be very difficult for the government to satisfy such a burden of persuasion. If so, prudential or strategic considerations may counsel against a change in position or, at a minimum, affect the scope and degree of any change the government seeks to make in its relief request.

This last point may be of crucial importance in many cases in a variety of contexts. There may be no legal barrier to a particular change in position in pending litigation. There may be no institutional concern or other principle of responsible law enforcement that counsels against a change in position, or there may be concerns pointing in opposite directions but the balance may favor a change of position. Nevertheless, when the change is one that will have to be explained to a court and when the court will have to be persuaded or at least not offended, an additional and powerful prudential consideration comes into play as a check on overzealousness by a new administration. The more compelling the reasons that may be articulated for the government's change in position, the less likely the court will view the change as politically motivated. The less compelling the reasons that may be advanced, the more likely the government will suffer a loss of credibility with the court, not only with regard to the issue on which it has changed position, but possibly with regard to its entire case. Needless to say, a court is more likely to be persuaded, or at least less likely to be offended, by a change in position that restores an approach taken through several administrations but abruptly abandoned by the Reagan administration than by a change that simply takes a more aggressive position on a previously untested issue of fact or law.

In many other situations the acceptability of a change in position may depend in substantial part on how advanced the litigation is at the time the change is made. Last-minute changes present problems of fairness and credibility more severe than changes made at an earlier stage. Similarly, the more clear the error of the prior administration's position, the stronger the argument for change; the more debatable the issue, the greater the likelihood that discretion may be the better part of valor, suggesting that the more aggressive approach be saved for a new case in which the extra burden of changing position is not involved. Of course, the danger that an adverse legal precedent may be set if the position is not changed in the pending litigation would also need to be taken into account.

Other circumstances may be hypothesized in which the government probably should not change its position even if it is legally free to do so, or in which the new position probably should be more moderate -- less at odds with the former position -- than it might be in a case where a different position had not been advocated previously. As already indicated, the government should be more reluctant to change positions on factual issues where reasonable people may differ, as compared to issues on which the prior administration was plainly wrong in its view of the facts or the law. Certainly, the government should not simply change its positions willy-nilly for political reasons.

There may be cases in which a new administration should restrain its desire to allege additional violations by a defendant or to expand upon the theories of liability it advocates, even if it is legally free to do so and could persuade a court to allow it to do so. Considerations of institutional continuity and fairness to the defendant, appropriate priorities, positive public image, and self-restraint may all suggest that the novel theory of liability be saved for a new case or cases, or that the additional arguable violation not be pursued in the case of this particular defendant. In other cases, of course, the balance of considerations may suggest the opposite conclusion. The same considerations may be applicable to some decisions whether to be more rather than less aggressive with regard to remedies sought in pending cases, assuming that there is room for discretionary choices between remedial strategies each of which would be sufficient to satisfy minimum legal requirements.

A new administration may inherit pending cases that it would not have brought in the first place but which it cannot simply drop without raising serious concerns about institutional continuity, the effect on the Department's public image, or reliance interests on the part of the victims of the allegedly unlawful practices. There were no doubt many Civil Rights Division cases that (like some antitrust cases) the Reagan administration would not have initiated and would have liked to have dropped, but instead continued out of concern for the furor that would otherwise have been created, and perhaps out of other concerns as well.[39] The next administration will probably find far fewer cases that the Reagan Justice Department brought and that it would not have brought, but it may find some, such as, for example, "reverse discrimination" cases,[40] low-impact housing discrimination cases,[41] or housing cases challenging "integration maintenance" quotas.[42]

The Reagan administration filed and has so far prevailed in a suit challenging integration maintenance housing quotas implemented by a defendant (Starrett City Associates) whose practices the Carter Justice Department had decided it would neither challenge nor support, and at this writing a petition for certiorari is pending in that case.[43] The integration maintenance issue is a difficult one that can be argued responsibly both ways, because it is not entirely clear which position better serves the goals of the Fair Housing Act and the needs of the groups the legislation was designed specifically to protect. Indeed, in this kind of case there appears to be some tension between the broader goals of the Fair Housing Act and the immediate interests of some minority persons in access to housing on a nondiscriminatory basis. Moreover, in any particular case integration maintenance may be more or less appealing depending on the nature of the quota and the factual context in which it has been imposed.

The Second Circuit's opinion in the Starrett City case can be viewed as limited and fact-bound, and the new administration may agree with, or have no serious disagreement with, the court of appeals' decision. On the other hand, the new administration may agree with Judge Newman's eloquent dissent. In the latter event, the government would nevertheless need to think long and hard before attempting to drop a suit in which a district court and a court of appeals have found the defendant to be in violation of the Fair Housing Act. It would be extremely difficult to justify taking such an action even if it were legally possible to do so and even if private plaintiffs or intervenors were disabled by the settlement of a prior class action from vitiating the effect of a dismissal of the government's suit.[44]

Putting to one side the question of attempting to drop the government's suit, and continuing to assume hypothetically that the new administration is unhappy with the Second Circuit's decision, the response to the petition for certiorari will be filed by the present administration, and the new administration may choose to take no further action unless certiorari is granted. In that event, still assuming hypothetically that it disagrees with the prior administration's position and the Second Circuit's decision, the new administration may choose to adopt a position that occupies a middle ground on the legal issue and perhaps even supports the result in this particular case, rather than to effect a complete reversal of the government's position in the litigation. In deciding how to proceed, the new administration should not limit its review to the abstract legal issue or even to the application of its view of the law to the facts of this particular case, but should carefully consider all relevant principles of responsible law enforcement, including those addressed to institutional and historical continuity, humility and self-restraint, and maintaining a positive law enforcement image.[45]

One final series of hypothetical situations should be mentioned. These relate to questions of declarations of unitariness, releases from court supervision, and approval of retrogressive student assignment plans, in situations where the status of the legal proceeding is such at the time of the new administration's accession to office that the government is not necessarily legally bound by the position taken by the prior administration. As previously noted, the questions raised can be difficult both factually and legally, and the applicable legal standards have not yet been definitively established.[46]

Various issues may arise in various procedural contexts. A motion for a declaration of unitariness, release from court supervision, or approval of a retrogression plan may be pending but not yet acted upon, the Reagan administration may have taken a formal position on the motion, and the new administration may need to decide whether to withdraw the government's previous response to the school board's motion or to withdraw the government's motion. Alternatively, motions may not yet have been filed, but the Reagan administration may have notified the school board formally of the government's proposed position; or the school board may have taken actions based on informal communications regarding the government's position, and may or may not have submitted proposed revisions in the student assignment plan to the court for approval. In some cases a revised student assignment plan or release from court supervision may be expected to result in no or a relatively insignificant increase in racial separation; in other cases, substantial retrogression may be anticipated.

Each situation may be different, and many may present very real tensions between a proper application of the law to the facts and, on the other hand, the expectations of school boards and patrons based in part on assumed institutional continuity. In addition, legitimate expectations of school boards and others for continuity with the Reagan administration's position may conflict with equally legitimate expectations of minority patrons for a review of the applicable law and facts from a standpoint more sympathetic to their rights and interests and more consistent with the Department's approach to such matters under other administrations. In weighing the pertinent law enforcement considerations, it would be relevant to ask whether the legal and factual questions are close and difficult as opposed to clear and obvious; whether the issues are worth reopening as a matter of appropriate priorities and from the standpoint of promotion of peace rather than discord; what the impact of reopening the issues might be on the Department's public image and on the perception and the reality that it is operating on a non-political basis; and what the likelihood is that the court could be persuaded to adopt the new administration's changed position on the matters in question. One can imagine cases in which it would be fairly clear that the proper course is to leave well enough alone, and others in which it would be fairly clear that the prior administration's action was indefensible, will have significant impact, and should be set right if at all possible. Other cases falling between the two extremes may call for decisions of substantial difficulty.

IV. Conclusion

In any given case it may or may not be objectionable for a new administration to change the prior administration's position in pending litigation. The totality of the circumstances must be considered in evaluating each instance of such conduct. In addition, while each change of position must be analyzed on its own merits, it is also relevant to consider the overall pattern of a new administration's actions in this regard, because the pattern as a whole as well as each individual action has an impact on the Justice Department's overall posture as a responsible law enforcement agency.

The same standards used in analyzing the Reagan Justice Department's record should be applied in evaluating other administrations. Standards are available to guide the Department's conduct, but a mechanical formula for decisionmaking is not and cannot be available. In the final analysis, what is required is the exercise of good, sound, responsible judgment on a case-by-case basis. In the civil rights area as in other spheres of Justice Department responsibility, the first priority of the new administration should be to insure that men and women of integrity, intellect, experience, judgment, and fidelity to the rule of law are in a position to make the necessary decisions, and to instruct them to act on a nonpolitical basis, without ideological blinders of the left or right, without fear or favor, and pursuant to principles of responsible law enforcement. If this priority is fulfilled, then the new administration will have taken the essential first step toward the goal that the decisions made, including those on which reasonable people may differ, will enhance rather than undermine public confidence in the administration of justice.

APPENDIX

The following excerpt is reprinted from Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. Ill. L. Rev. 785, 790-95 (1986), by permission of the author and the Board of Trustees of the University of Illinois.

III. PRINCIPLES

The radicalism of the Reagan approach is reflected in the degree to which the Civil Rights Division in this administration has departed from ten important principles of responsible law enforcement. Whatever view one takes on substantive policy issues, the validity of these principles should not be controversial from an administration of justice standpoint. Although these ten principles are not an exhaustive catalogue, they define the most significant shortcomings of the Reagan record.

A. Respect for the Law

The foremost duty of the Department of Justice is to enforce the law as declared by Congress and the courts. The Department does play a significant role in the development of legal precedent, and it can and should pursue its vision of proper legal policies and standards. Its discretion in this regard, however, is circumscribed by binding legislative and judicial determinations. Any administration properly may attempt to persuade Congress or the courts to change the law to bring it more in line with that administration's policy preferences. The Department of Justice, however, is not free to decline to enforce existing law merely because of disagreement with it. Fundamental precepts of separation of powers and executive branch duty preclude any claim of discretion to ignore the law. When the Department is responsible for enforcing statutory rights, it should give a fair reading and reasonable deference to congressional intent. When the Supreme Court has ruled on the meaning and impact of statutory or constitutional provisions which the Department must enforce, the Department should give full scope and effect to the Court's decisions. The Department also should support the actions of the lower courts when these courts effectuate pertinent statutes or Supreme Court decisions, whether or not those laws or decisions are popular with any particular political constituency.

B. Regard for the Facts

The Department should apply the law in any given case with a fair and proper regard for the relevant facts and circumstances. The Department's law enforcement role does not grant it the license for biased factual analysis and argument enjoyed by private litigants. Decisions regarding the existence, nature, and scope of prosecutable violations, and the necessity or appropriateness of particular remedies, should derive from an objective view of the facts of the case. Although the Department may choose among reasonable conflicting factual interpretations and can and should use its best judgment in evaluating and presenting the facts to the courts in a persuasive fashion, a high standard of fairness and objectivity should govern the Department's discretion in this regard. Of course, no litigant should distort the facts or attempt to mislead the courts or opposing parties, but these strictures apply with special force to the legal representatives of the United States. If the Department ignores the facts to achieve particular results for ideological or other reasons, then it fails in its obligation to give proper weight to the rights and interests of all citizens affected by its actions.

C. Institutional Continuity

Within the bounds of proper respect for the law and regard for the facts, different administrations generally are free to pursue different legal interpretations and programmatic strategies. However, such freedom should be restrained to some degree by the demands of institutional continuity and consistency. These demands are especially strong in the context of ongoing litigation. A decision to apply standards in the prosecution of new cases which differ from those applied by a previous administration is quite distinct from a decision to apply different standards in pending litigation so as to alter the basic thrust of the Department's prior positions. Shifts of position in pending litigation undermine the public's and the courts' perception of the Department as a law enforcement agency; the result is damage to the Department's prestige and effectiveness. Changes of position also may be unfair both to defendants and to victims who look to the Department for redress of legal violations. Whether the need for continuity precludes a particular position in a particular case is a matter of judgment. But the Department must make responsible judgments on shifts in position; otherwise its cases and the people affected by them become mere political footballs, or objects of experimentation and manipulation rather than of legitimate law enforcement.

D. *Historical Continuity*

Although historical continuity may be more intangible than institutional continuity, the concept is nevertheless of substantial importance. The Department should not make discretionary law enforcement choices in an historical vacuum. When considering departures from the policies or legal interpretations of prior administrations, the Department should know when it is too late to make certain changes responsibly, absent legislative or constitutional revision. Some legal interpretations and law enforcement policies are so settled as to give rise to significant reliance interests on the part of citizens, the Congress, and the courts. These reliance interests may be so substantial that attempts to disturb them would be irresponsible, even if a strong argument exists that the earlier decisions were mistaken. Considerations of historical continuity also should affect the Department's basic definition of its role in law enforcement. Historical continuity is especially relevant in the case of the Civil Rights Division, which, although it is not the property of the civil rights movement or any other constituency, has played a distinctive role in the nation's legal and social history. Those responsible for determining the Division's current posture and direction should not ignore its singular history.

E. *Appropriate Priorities*

Each administration must establish priorities for allocating limited law enforcement resources. Although incremental adjustments in priorities based on executive policy determinations are legitimate, decisionmakers should establish priorities within the parameters set by the Attorney General's statutory obligations. For example, the Antitrust Division may not appropriately close its eyes to illegal vertical price fixing simply because it believes that enforcement of the law in that area is either contrary to sound economic policy or of lower priority than other aspects of its responsibilities.[17] The same is true with regard to the panoply of civil rights laws that the Attorney General statutorily must enforce. Similarly, when determining the focus of its enforcement efforts, the Department cannot ignore legislative assumptions concerning those efforts reflected in the underlying statutory grants of enforcement authority.

F. *Positive Public Image*

The image the Department projects to the world at large can have a significant impact on its effectiveness as a law enforcement agency and should be an important concern of the political appointees whose actions and pronouncements shape that image. The desired image should be a positive one, emphasizing commitment to aggressive and even-handed law enforcement. Such an image encourages citizen cooperation and a receptive forum in the courts, thereby generating information on prosecutable violations and enhancing the prospects for success in government litigation. A positive, aggressive image also fosters voluntary compliance by potential violators, a factor of considerable importance in view of the limited resources of the Department. Just as an image of positive commitment produces a valuable deterrent effect, an image of lack of commitment to the enforcement of certain laws invites violations of the law and noncompliance with outstanding court decrees, thus generating enforcement problems no administration should welcome. In the civil rights area, if the Department conveys an image of opposition to the law as declared by Congress and the courts, it lends an aura of legitimacy to negative racial attitudes and renders aid and comfort to the opponents of racial progress. Of course, the Department should not exalt image over substance, nor should it devote undue attention to the appearance as opposed to the reality of its activities. But image does have an impact on the Department's ability to accomplish its mission, and those whose duties include presenting the Department's policies to the public should take care to cultivate a positive image.

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[17] *But see* Wash. Post, Aug. 13, 1982, at A1, col. 1 ("[Ass't Att'y Gen. William F.] Baxter, chief of the Justice Department's Antitrust Division, said in an interview that he agrees . . . these pricing agreements are illegal and may result in higher costs to consumers. But since he has other reasons for believing that the laws against this form of price setting don't make good economic sense, Baxter said he will only enforce them in special cases.").

G. Separation from Politics

The Department should eschew politics in all its law enforcement activities. It represents all citizens of the United States and should be irreproachably nonpartisan in its relationships to all persons affected by its actions. Decisions on whether to initiate litigation, on what terms to settle cases, and on what positions to take in court should be made without regard to the political affiliation or the constituency status of those whom the decisions may benefit or burden. In performing its law enforcement function, the Department's duty does not include representing any administration's partisan political agenda. The Department's client is the law and the public interest. The views of judges, attorneys, and citizens with whom the Department deals span the political and ideological spectrum, and the Department should not curry favor with anyone, or disserve anyone's interests, because of such considerations. Although no administration has been entirely pure in this or any other respect, the importance of the point cannot be overemphasized. Every enforcement decision the Department makes should depend solely on the relevant law and facts, and not on extraneous political or ideological considerations.

H. Utilization of Institutional Strengths

The presidential appointees who populate the upper levels of the Department have at their disposal the advice and talents of the cadre of career attorneys, including supervisors, who perform the day-to-day work. These attorneys can make available to a receptive Assistant Attorney General the strengths that their experience and institutional traditions provide.[18] The expertise of these attorneys is available to all administrations. Each transient administration has a reciprocal obligation to preserve and build on the inner strengths and external prestige accumulated by the Department over longer time periods. When the political leadership of the Department treats career attorneys and the traditions to which they are devoted with respect, it will enjoy benefits that cannot be derived from an occupation army mentality. Although career attorneys may disagree with certain policies of an administration, they can and will assist in implementing those policies that remain within the bounds of allowable discretion. The moderating influence of professional law enforcement officers is an essential ingredient to the success of any administration. To the extent that an administration regards career attorneys as the enemy, its stewardship of the Department will be compromised.

I. Self-Restraint

Humility and self-restraint play an important role in law enforcement. When confidence in one's policy preferences rises to the level of arrogance, as may occur when ideology is excessively prominent, the result may be a failure to appreciate many of the salutary principles outlined here. Regardless of an administration's preconceived views as to what the policy and content of the law should be, the political leadership is bound to go astray if it is unable seriously to consider that the contrary views of others, including the courts, might be correct. The political leadership of the Department should not reflexively assume that it possesses judgment superior to that of its predecessors in office, particularly when the independent federal judiciary has adopted those predecessors' views. Ideological arrogance also may create indifference to the inescapable factual or legal context of a particular case, and thereby lead to the pursuit of unsupportable positions that the courts will never adopt.

J. Promotion of Peace

In the area of civil rights, the Department of Justice should be a tiller of racial peace, not a sower of racial discord. This does not mean that it should fail to enforce the law because some persons may be upset by such activity, or that it should refrain from trying to persuade the courts to change the law simply because such efforts may be controversial. However, the Department's enforcement program should be designed to make an enduring contribution to racial harmony and progress, not to align the government with one racial group as opposed to another or exploit the racial divisiveness that still exists in our society.

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[18] For a discussion of the traditions of the Civil Rights Division, see *supra* text accompanying notes 3-16.

K. Other Principles

The foregoing discussion does not present an exclusive list of all principles of responsible law enforcement. Other desiderata would include, for example, talent, budget, quality work product, and efficient management. The above ten principles, however, serve as a partial blueprint for any effective law enforcement program. The remainder of this article discusses the extent to which the Reagan administration has followed a different blueprint in the civil rights area.

CHAPTER VI

THE JUDICIAL NOMINATIONS PROCESS: SEEKING A COMMITMENT TO EQUAL JUSTICE

by Shari Loessberg,
Jeffrey Liss, &
Valarie Yarashus

> *From a civil rights perspective, the judicial appointment process in the last eight years has equaled grand scale retreat and defeat.*

I. Introduction

When the forty-first President takes office in January, fully half--over 400--of the sitting federal judges will be Reagan appointees. Many of these judges, some still in their thirties, will be deciding cases and making law well into the next century. Long after Mr. Reagan has returned to the ranch, long after many of the Senators who confirmed them have themselves left public office, these life-tenured appointees will be pronouncing what the law is for a new generation of Americans. The next President will also have an opportunity to leave his mark on the judicial landscape. This paper addresses what we should demand from those people whom the next President would make judges.

Historically, judicial appointments have been used as rewards for political service, or, at least, have been made from the ranks of the President's party. For the last century--for both Democrats and Republicans--the percentage of same-party appointments has averaged about 90 percent.[1]

Under President Reagan, partisanship was even more extreme. Through 1986, 95 percent of Ronald Reagan's nominations to the federal district courts were Republican. Further, in those six years, he did not appoint a single Democrat to the court of appeals. Not since Warren Harding did a president so exclude the other party from the appellate bench.[2]

It is ideology, an ultraconservative ideology far beyond mere partisanship, that drained from the judicial selection process any consideration of a nominee's commitment to civil rights and equal justice. Instead, Ronald Reagan exploited the nominations power in an effort to further a conservative social agenda. Ideological purity became the primary, and sometimes sole, benchmark by which candidates were judged. While often cloaked in the reasonable-sounding rubric of "judicial restraint" and "original intent," ideological litmus tests eliminated from appointment almost any individual who had demonstrated a commitment to equal justice. From a civil rights perspective, the judicial appointment process in the last eight years has equaled grand scale retreat and defeat.

This paper first reviews the process that all district, appellate and Supreme Court nominations must undergo. It then examines the philosophical changes imposed on that process by the Reagan Administration, and finally recommends changes for the incoming president to adopt. Specifically, this paper recommends that the next Administration take the following steps:

1. Condemn and reject ideological litmus tests.

2. Require instead of every applicant a *demonstrated* commitment to equal justice under the law.

3. Implement procedures to actively recruit a diverse pool of qualified applicants.

4. Reactivate the commission approach to court of appeals nominations.

5. Allow for greater public input on nominees by individuals and groups during the investigational stage.

6. Increase Congressional appropriations to the Senate Judiciary Committee, and call on the Committee to perform more thorough investigations of nominees.

7. Call on the American Bar Association to make its investigation and recommendation process more open, by seeking more input from civil rights and public interest groups.

II. An Overview of the Nomination Process

The federal judiciary functions on three levels: District (trial); Circuit (appellate); and Supreme Court (final review). Although the selection process varies for each, they share some common elements.

The President's power to nominate judges and the Senate's coequal power of advice and consent are both derived from the Constitution. Beyond that basic grant of power, however, the Constitution is silent. Thus, the actual process of selecting a judge has long been a function of politics and patronage.

A. Drafting the List of Candidates

Before a formal nomination is announced by the President, an enormous amount of screening and interviewing will have already taken place. For each nomination, a list of three to six candidates will have been compiled. The following summarizes recent methods of drafting the list of preliminary candidates:

1. The District Courts

Vacancies at the trial level are usually filled through an exercise of "senatorial courtesy." During President Reagan's terms, this courtesy granted the senior Republican senator from the state with the vacancy the right to recommend a list of three candidates. If there was no Republican senator, the courtesy passed to that state's senior Republican House member or sometimes to a Republican governor.

2. *The Circuit Courts*

At the court of appeals level, senatorial courtesy has been replaced with different mechanisms. Under President Carter, independent regional commissions composed of lawyers and laypersons screened and interviewed applicants for the position and then reported a list of five names to the President. The President then made his final selection from among those names.[3]

Mr. Reagan, however, dismantled the commissions, and instead centralized the selection process within the Department of Justice, inside the Office of Legal Policy (OLP). OLP picked its candidates based on "a review of their written work, and recommendations from local bar leaders and members of Congress."[4] The lists were compiled with input from White House staffers assigned to the area of judicial nominations (see Part B, below). OLP's lists usually included five or six names.

3. *The Supreme Court*

Vacancies on the Supreme Court occur too infrequently for valid generalization.

B. Investigation and Interviews

Once the list of candidates for a vacancy has been proposed, the investigation and interview process starts. Every candidate, regardless of the level of the vacancy involved, undergoes this process.

1. *The Justice Department*

During the Reagan Administration, once a list of candidates had been prepared, OLP undertook a preliminary investigation of each individual. These investigations relied primarily on information available from party officials, lawyers and judges from the candidate's home state. At the same time, the candidates were invited to the Justice Department for a series of approximately six individual interviews, averaging about an hour each.

On the basis of summaries of the interviews and OLP investigations, the Attorney General chose one candidate from the list. This individual would then be put forward and discussed at a meeting of the President's Federal Judicial Selection Committee, an *ad hoc* group consisting of high-level White House and Justice Department appointees.

If the Committee approved of the candidate, his or her name was sent on to the Federal Bureau of Investigations and also to the American Bar Association's Standing Committee on Federal Judiciary for more thorough investigation. If these groups uncovered no problems, the name would be recommended to the President, who would then make the formal nomination.

2. *American Bar Association.*

Although sometimes controversial, the American Bar Association's Standing Committee on Federal Judiciary plays an important though unofficial role in the selection process. This ABA Committee independently reviews each nominee. Based on its investigation, it then rates the nominee's degree of qualification: unqualified, qualified, well qualified, or exceptionally well qualified.[5] The ratings are reached by Committee vote, and controversial or strongly split votes are sometimes reported out with majority and minority ratings.

Despite the weight both the Judiciary Committee and the media give to the ABA ratings, the committee as a rule makes no public explanation of its deliberations or the conclusions of its investigations. This secrecy has been attacked by both conservative and liberal organizations. A recent court opinion, however, has rejected a claim that sought to make the ABA committee proceedings subject to federal public access laws.[6]

3. *The Senate*

After formal nomination, the investigation and interview process moves to Capitol Hill. Under the Constitution's charge to the Senate to give its advice and consent, all judicial nominations are subject to Senate confirmation. Before a nomination is sent to the floor for a vote, the Senate Judiciary Committee conducts an independent inquiry, holds hearings, and votes on the nominee's fitness.

The Judiciary Committee's role in the confirmation process has changed dramatically during the past decade depending on the institutional and political comity between the President and the Senate. For example, in 1978-79, when Senator Kennedy chaired the Committee through hearings on more than 200 of President Carter's nominees, the process took an average of 57.8 days.[7] In contrast, under Senator Strom Thurmond (R-S.C.), the chair of the Committee from 1980 to 1986, the Committee's independent investigation of President Reagan's nominees was minimal at best.

From 1981 through late 1985, the Committee took less than three weeks to prepare, investigate, examine, hold hearings, and vote on an individual's fitness to take office as a life-tenured, enormously powerful federal judge.[8] At the hearings themselves, as many as six and sometimes up to ten nominees would be reviewed in a morning session lasting two hours. Further, during the Thurmond years, the Committee would usually vote on the nomination the day following the hearing.[9]

In late 1985, however, the Democrats, under the leadership of then-Ranking Minority Member Joseph Biden (D-Del.), negotiated an agreement with Senator Thurmond.[10] The pact required nominees to publicly disclose substantially greater information concerning their professional background, experience and competence. It also fixed minimum time periods between the time a nomination was announced, the date hearings were held and the time a vote actually took place.

In 1986, when the Democrats regained control of the Senate, Senator Thurmond was replaced by Senator Biden as chair for the Committee. Since that time, the rush to approval has slowed considerably, hearings have been better attended by members, and investigations have become more thorough. Senator Patrick Leahy (D-Vt.) has had primary responsibility for oversight on nominations.

As a result of this heightened scrutiny of nominees, however, the resources of the Committee's investigatory staff have become seriously overburdened. The majority can fund only four investigators, the minority but two. As a result, the Committee process has ballooned to an average of approximately 90 days and its investigative staff still relies on research provided by outside groups.

Following the Judiciary Committee's vote, the nomination then goes to the full Senate for confirmation. A majority vote is required for approval.

II. Perspectives on the Nominating Process

This section reviews the methods by which ideological purity displaced more objective standards during the Reagan years. In particular, it highlights the primacy of ideology and lack of diversity in nominees' backgrounds; reviews how the centralized nature of Reagan's nomination process precluded broad-based recruitment; and summarizes several examples of nominees with demonstrated insensitivity or even hostility to civil rights who were nevertheless named to the bench.

A. Rhetoric and Action

While the typical American's image of a federal judge is still probably that of a white-haired gentleman full of wisdom and fairness, the reality is far different. Steve Markman, former Assistant Attorney General in charge of OLP, maintained in Congressional testimony that for the Reagan administration, "compassion, dignity and propriety, and the intellectual capacity to deal with the difficult legal issues of a complex society"[11] were "critical and essential"[12] qualities for a nominee. Certainly those standards should yield ideal nominees. In execution, however, the selection process -- represented by such nominees as Jefferson Sessions, Lino Graglia, and Daniel Manion[13] -- often veered far from such criteria.

To pass muster, a Reagan nominee had to be able to persuasively pledge allegiance to the doctrines of "judicial restraint" and "original intent." Such phrases have effectively been unmasked as conservative code, serviceable only if the precedent is liberal or the early writings conservative.[14] As Professor Schwartz explains,

> For their part, in order to favor business, Reagan [appointee] antitrust specialists have encouraged judicial interpretations of the antitrust and other regulatory laws that conflict with the clear congressional intent. Thus [rejected Supreme Court nominee Robert] Bork said in a November 1986

> speech that even if Congress intended the courts to consider social and political values and not just economic efficiency, "it doesn't matter" -- the courts can and should ignore the congressional will.
>
> In short, the conservatives us[e] "judicial restraint," "federalism," "original intent," and all the other ostensibly neutral principles to serve conservative economic and ideological interests. When those high-sounding principles get in the way of those interests, the principles are simply ignored.[15]

Nevertheless (to indulge in originalist argument), it cannot be forgotten that it was the Founding Fathers' intent that the judiciary act as the protector of the politically weak or the unpopular against the passions and tyranny of the majority.[16] The previous administration's decision to ignore this vital part of the courts' original role and to not seek individuals with a demonstrated commitment to equal justice is an injustice that must be corrected by the new administration.

B. Diversity

"[D]iversity on the federal bench . . . is important partly because judgeships have traditionally rewarded significant accomplishment in the legal profession, and also because diversity on the bench increases public confidence in the ability of the federal courts to respond fairly and equitably to the legal claims of all the American people."[17] In eight years and out of a total 378 judicial appointments, Ronald Reagan appointed only eight black individuals, or 2.1 percent of all nominees, to the federal bench. Thirteen, or 3.4 percent were Hispanic, and .5 percent or 2, were Asian. Further, only 8.2 percent, or 31, of the nominees were women.[18] In defense, Markman maintained that, "Nothing would please us more to find more qualified black and minority candidates in this process. It is not easy, however. There simply is not the pool."[19]

This statement is contradicted by the facts, however. As summarized by Paul Friedman, former President of the D.C. Bar:

> The District of Columbia Bar, the third largest state bar in the country, undoubtedly contains one of the broadest single pools of women and minority lawyers in the country, including approximately 8,000 to 10,000 women, 2,500 black and 600 Hispanic lawyers. These women and minorities represent a disproportionately high number of the women and minority group members currently licensed to practice law in the United States.
>
> Women and minorities can be found among both the senior and junior partners of Washington's largest and most prestigious law firms. Indeed, the District of Columbia has the largest number of both women partners and minority partners at major law firms of any city in the country. The federal and D.C. governments also contain highly qualified women and minority lawyers at all levels of seniority and responsibility, as does the local judiciary.[20]

And yet, until the eighth year of Ronald Reagan's presidency, every appointee to the District of Columbia federal bench--eight to the D.C. Circuit and six to the D.C. District Court--were white males.[21]

Further, this lack of "the pool" did not prevent previous administrations from naming many more women and minorities to the federal bench. For example, the Carter Administration actively sought out qualified and experienced candidates, including those who were not within "the pool" of Ivy-educated, large firm, white male lawyers. Mr. Carter's record on this issue is impressive.

President Carter appointed 262 judges, 40.2 percent of the federal judiciary. Of the 56 judges he named to the courts of appeals, 11, or 15.9 percent, were women, nine were black, two were Hispanic, and one Asian. At the district level, out of 202 judgeships, 29 (14.4 percent) went to women, 26 (13.9 percent) to blacks, and 14, (6.9 percent) to Hispanic; one Asian was also appointed.[22]

"New institutional agents were created to aggressively recruit the best qualified candidates and especially to seek out qualified women and minorities."[23] In addition to the commissions set up to select appellate court candidates, the President also informally encouraged senators to use merit selection panels to nominate district court judges.[24] Further, the Carter Administration sought input from professional groups other than the ABA. The National Bar Association (a predominantly black bar association) and the Federation of Women Lawyers were among those regularly consulted.

In contrast, Markman acknowledged that, of all the recommendations these groups made to OLP during the Reagan years, "to the best of my recall, I do not believe that we have nominated any individuals whose names have first come to our attention through those organizations."[25]

Thus, the Reagan Administration's utter lack of diversity stems not from a lack of qualified candidates, but from the Administration's refusal to attempt to identify qualified individuals and thus broaden "the pool." The Administration chose instead to dismantle the merit commission system and to close off channels that could have identified these qualified women and minority candidates.

C. The Cost of Centralization

It is ironic, certainly, that an Administration that advocated so strongly the return of governmental powers and responsibility to the local level should have effectively ignored the resources and input of groups at that level in making judicial nominations. For the last eight years, the entire process of deciding who would become life-tenured federal judges was centered almost exclusively among a few appointees within the White House and a small office at the Justice Department.

This, of course, is a defensible approach. OLP officials maintained that a decentralized, open decision-making process would have allowed too much politicking and would have "given away" too important an executive power. Indeed, a centralized system is, on its face, more efficient and easier to operate. It is likely to result more quickly in a consensus in selecting a nominee.

Such efficiency, however, is purchased only with the sacrifice of diversity and the ability to readily identify and recruit qualified individuals who would otherwise fall outside "the pool." During the Carter Administration, the merit commission was first implemented on a national scale. The commission actually functioned as 13 regional panels, each corresponding to one federal circuit.[26] Each panel consisted of ten members, with a mixture of lawyers and non-lawyers. Women and minorities were represented in rough proportion to their numbers in a circuit's population. Although there were a few Republicans and independents, the panels tended to be heavily Democratic. The panels screened applications and met to interview candidates whenever a vacancy occurred. Following the interview process, a list of five names was sent to the President for his final selection. Part of the panel members' duties was to encourage or recruit qualified individuals. As a whole, the panels also welcomed input from local bar groups and officials and other civic and watchdog organizations.

The activity of panel members resulted in many qualified federal judges taking the bench who might otherwise never have been identified.[27]

In sum, the advantages of regional commissions included:

- effective recruiting, investigation and comment on candidates at the grassroots level;
- the capacity for watchdog and public interest groups to know where to focus their support or disapproval;
- a reduction, in fact and in appearance, of the weight of "old boy" connections; and
- identification of a broader, more diverse pool of candidates.

D. The Costs of Ideology

Ronald Reagan brought with him to office a well-publicized, conservative agenda of "social" issues. Despite Reagan's best efforts, however, Congress refused to act on matters such as abortion or school prayer.

Notwithstanding--indeed, because of--his failures with the legislative branch, the President turned to the judiciary and the nominations power to attempt to accomplish his social agenda. As Pat Buchanan, former White House communications director conceded, "The appointment of two justices to the Supreme Court could do more to advance the social agenda--school prayer, anti-pornography, anti-busing, right-to-life and quotas in employment--than anything Congress can accomplish in 20 years."[28] When Mr. Reagan was later asked "if he agreed . . . that court appointments, and not legislative initiatives, were the key to advancing the social agenda of conservatives," the President replied, "Yes."[29] Of course, it was precisely this zeal to perfect a conservative judiciary through ideologically "correct" nominations that displaced any consideration of a nominee's commitment to equal justice.

Along the way, a number of well qualified Republicans were denied nominations. Worse, in many cases, as long as a candidate's credentials were sufficiently conservative, any number of defects or "youthful mistakes" were dismissed or forgiven, and in a few cases, gross deviations in competence or character were tolerated.

The Administration's focus on ideology left little time for inquiry into a nominee's "character." While difficult to quantify, Americans set great store by the notion of a judge's integrity. For the judiciary, with no tanks or Treasury to give weight and force to its decisions, respect, even reverence, for our courts and the judges who work there is essential. When President Reagan nominated Daniel Manion to the court of appeals, he lost sight of that crucial fact.[30]

Daniel Manion was an undistinguished, intellectually non-gifted lawyer from South Bend, Indiana. A report compiled by the Chicago Council of Lawyers reviewed the quality of five of what he deemed his "best" briefs. The Council cited this sentence as typical: "Under certain conditions to knowingly misstate the contents of a writing and to purposely misstate the facts which would cause signing the same as fraud."[31] But Daniel Manion was also a conservative with an impeccable bloodline. His father had been a radio show reactionary and had helped found the archconservative John Birch Society. Further, during the younger Manion's one term as a state legislator, he sponsored and vocally supported a law that would have authorized public schools to post the Ten Commandments and to teach creation science.[32] Such a law, of course, would have been in direct contravention of *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).[33] With credentials like this, plus the help of former law school classmate and family friend, Senator Dan Quayle, Daniel Manion became an appellate judge on the Seventh Circuit Court of Appeals.

Patently inadequate nominees like Daniel Manion were certainly the exception. From a civil rights perspective, however, Manion's background was almost mainstream. During the Reagan era, it was not unusual for a nomination or application to remain pending even after serious charges of racial or other insensitivity came to light.

Into this group fall individuals like *Jefferson Sessions*.[34] Sessions was a Mobile, Alabama lawyer who had come to prominence by prosecuting black civil rights activists on voting fraud charges.

Upon Sessions' nomination, the NAACP Legal Defense Fund began compiling background data on him to use in opposing his appointment. In their records, the NAACP produced evidence that Sessions "had called the NAACP 'un-American' and 'Communist-inspired' organizations that were 'trying to force civil rights down the throats of the people'; had called a white lawyer who represented civil rights workers 'a disgrace to his race,' and thought the Ku Klux Klan was 'OK until I found out they smoked pot.'"[35] Sessions' nomination failed in committee, 10-8.[36]

Similarly, *Lino Graglia*, a professor at the University of Texas law school, was strongly supported by Attorney General Meese for a nomination to the Fifth Circuit. In the classroom, however, he demonstrated gross insensitivity towards minority and women students. In interviews, he admitted to calling blacks "pickaninnies." The derogatory teaching style was so well known that, when assigned to his constitutional law class, many black students would request and receive transfers to other sections. Further, he had vocally urged parents to defy a court-ordered busing plan in his city. The ABA found the combined actions and attitudes of Graglia too excessive and rejected him as "not qualified." After the first ABA rejection, however, the White House asked former Attorney General and former Fifth Circuit Judge Griffin Bell to conduct another investigation. Only then did Reagan decide not to nominate him.

Also from Texas, *Sidney Fitzwater*, a 32 year-old state court judge, was nominated to a District Court position. During his Judiciary Committee hearings, however, it was discovered that he had, only three years earlier, posted intimidating, inaccurate signs at predominantly black polling places in Dallas in an admitted effort to reduce minority voting and help reelect Republican Governor William Clements, who had appointed him to the bench. Nevertheless, Fitzwater was voted out of the Judiciary Committee on a split vote, and confirmed on the Senate floor by a vote of 52-43.

Alex Kozinski. Although only 35 when nominated to the Ninth Circuit, Kozinski had already held two distinguished Administration appointments, as Chief of the Claims Court, and as Special Counsel to the Merit Systems Protection Board, better known as the "whistleblowers" protection agency. While at the Board, Kozinski was accused of perverting it from a shield that protected conscientious workers into an office concerned primarily with entrenching management. After somewhat truncated hearings, the Judiciary Committee voted him out with unanimous approval. By the time Kozinski's name came up for a floor vote, however, his reputation had sunk to the point that he was confirmed by a vote of only 54-43.

There are others, of course. Numerous well-qualified Republican individuals--often women--were rejected as "too liberal." More typical, and in the long run, perhaps more dangerous, are the intellectually competent but numbingly narrow-minded young men and women who *were* confirmed to the bench. Unwilling to view our legal system in anything but terms of conservative, free market economics, for them, the broader sense of "doing justice" is simply irrelevant, a distraction from the primacy of free market principles in the courtroom. In the process, the cherished protection of civil rights and guarantees has all too often been sacrificed for models of economic efficiency.

III. Recommendations

Based on the above review, we recommend the following actions:

1. Reject ideological litmus tests.

As discussed above, any system that exalts a rigid adherence to ideology over competence and impartiality is simply wrong.

2. Require a demonstrated commitment to equal justice under the law.

"Equal justice," of course, can be demonstrated in many ways. Certainly, it includes pro bono activities and contributions to or membership in legal organizations devoted to the administration of equal justice. In addition, however, a commitment to equal justice can be shown through any number of non-legal activities, *e.g.*, community service or other civic involvement.

The commitment requirement is not advocated as a substitute liberal litmus test. Rather, it should be used to guarantee that "confirmation conversions" will not be tolerated. It should also focus part of the selection process on broader issues of the applicant's character. Thus, inquiry into a nominee's membership in private clubs that discriminate against nonwhites--a rejection of equal justice--may be more useful, as Professor Steven Carter of Yale points out, than knowing "that a nominee has ruled that private clubs . . . are not regulated by the Constitution. [One] is a matter of debate, a matter on which one may take instruction, a matter for a later change of mind. But a lifelong habit of associating by choice with those who prefer not to associate with people of the wrong color tells something vitally important about the character and instincts of a would-be constitutional interpreter, something not easily disavowed by so simple an expedient as, for example, resigning from the club."[37]

3. Reactivate the merit commissions for appellate nominations.

Regional merit commissions, as discussed above, should be reinstated to screen and interview applicants for court of appeals nominations.

4. Seek greater input from the public on nominees.

While there is a valid concern that too much public and media involvement in judicial nominations is detrimental to the process, that concern must be tempered with the equally important duty to thoroughly investigate a nominee. The earlier an unacceptable candidate is identified, the more unnecessary controversy can be avoided.

5. Increase Judiciary Committee appropriations to allow for more thorough investigations.

The present investigatory staff is certainly efficient. Given the number of vacancies to fill, the backlog of pending nominations, and the need to more effectively investigate each nominee, however, of only six investigators cannot be expected to adequately meet the demands of the upcoming term.

6. Encourage greater openness from the ABA.

Despite the ruling in the *Washington Legal Foundation* suit, the ABA's role in the judicial selection process is too prominent for it in good conscience to continue to keep secret all its deliberations. Especially in light of the understaffed Judiciary Committee investigatory team, the ABA is simply too important not to be more open.

IV. Conclusion

The Reagan Administration's fixation on ideological purity superseded previous presidents' efforts to identify and nominate a broader range of qualified individuals who had demonstrated a commitment to equal justice. The insensitivity to civil rights and individual liberties of many of Ronald Reagan's appointees is an unfortunate legacy that will endure for years to come.

It is now the duty of the new administration to reject strident ideology as a criterion in selecting nominees, and instead, to appoint a qualified, diverse judiciary of individuals whose backgrounds reveal a longstanding commitment to the necessity of equal justice under the law.

For more than a generation, a key purpose of federal civil rights enforcement has been to combat segregated education and inequality of educational opportunity.

CHAPTER VII

FEDERAL CIVIL RIGHTS ENFORCEMENT AND ELEMENTARY AND SECONDARY EDUCATION SINCE 1981

by Elliot M. Mincberg
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I. The Problems of Segregation and Inequality of Educational Opportunity

For more than a generation, a key purpose of federal civil rights enforcement has been to combat segregated education and inequality of educational opportunity. As America approaches the 1990s, however, these problems continue to plague elementary and secondary education in our nation's public schools.

A comprehensive report by the National School Desegregation Project in 1987 concluded that there are "clear signs" of "deepening isolation of children growing up in inner-city ghettos and barrios from any contact with mainstream American society."[1] According to a twenty-year study of racial segregation in large school districts published by the National School Boards Association in 1988, black students are usually highly segregated from whites in big city districts, with no significant progress in desegregation since the mid-1970s and there are "severe increases in racial isolation in some areas."[2] For example, in about a fifth of our nation's largest urban districts, three out of every four black students attend highly segregated schools which are over 90 percent minority.[3] Segregation is growing worse for Hispanics, who have seen constantly increasing racial isolation in virtually all parts of the country.[4] Almost two-thirds of all minority students are enrolled in schools which are predominantly minority, and over 17 percent attend classes which are over 99 percent minority.[5] Although segregation has been reduced in some school systems, particularly where metropolitan desegregation plans have been implemented, significant areas remain today "where there is simply no sign that the Supreme Court ever ruled against segregation."[6]

In addition, inequality and inadequacy of educational opportunity remain a devastating problem for minority students. Schools serving predominantly minority pupils "continue to do much worse than white schools in academic achievement, graduation rates, and other key measures of academic opportunity."[7] Minority students are twice as likely to drop out of school as white students.[8] As many as 40 percent of minority children are functionally illiterate.[9] Overall, the largely separate education provided for minority students "has not become equal in the United States of the 1980s," and there is "no indication that the severe inequalities that led minority families and organizations to institute the early desegregation cases have yet been resolved."[10] Instead, a "great many black students, and very rapidly growing numbers of Hispanic students, are trapped in schools where more than half the students drop out" and "where the average achievement level of those who remain is so low that there is little serious pre-collegiate instruction."[11] In this context, effective and vigorous civil rights enforcement is more crucial than ever in the area of elementary and secondary education.

II. Background of Federal Civil Rights Enforcement and Policy in Elementary and Secondary Education Prior to 1981

Two agencies have primary responsibility for federal civil rights policy and enforcement with respect to elementary and secondary education: the Civil Rights Division of the Department of Justice (the Division) and the Department of Education, particularly the Office of Civil Rights (OCR). As a result of the Civil Rights Act of 1964, the Department of Justice obtained specific authority to file lawsuits in federal court to challenge segregation and inequality of educational opportunity, and to intervene in pending federal suits. *See* 42 U.S.C. § 2000c-6, 2000h-2. In 1966, the Justice Department announced a full-scale attack on segregated education, filing forty-four new lawsuits and thirty-five motions for enforcement or further relief in cases that were pending.[12]

Although the precise level of enforcement activity by the Division has varied, substantial numbers of new complaints and supplementary enforcement motions continued to be filed during both Democratic and Republican administrations during the 1960s and 1970s. As of 1974, for example, there were two hundred pending desegregation-related cases by the Division, affecting about five hundred school districts.[13] New lawsuits were filed against many school districts in 1975-81, including both northern and southern school systems. In addition to helping combat segregation and inequality of opportunity in the specific districts in which they were filed, the cases initiated by the Justice Department between 1965 and 1980 contributed to the development of a significant body of school desegregation law.[14]

In contrast to the Justice Department, which pursues its enforcement activities through the courts, OCR enforcement is through the administrative process. Specifically, OCR is responsible for enforcing federal statutes which prohibit discrimination, based on race, sex, national origin, handicap, or age, in all education programs and activities which receive funding from the federal government, including almost sixteen thousand local school districts.[15]

OCR uses two methods to investigate alleged violations of federal civil rights laws: complaint investigations, which are conducted in response to complaints received from individuals and groups, and compliance reviews, which are initiated by OCR based upon information gathered in OCR surveys. When OCR finds a violation of the law through either administrative procedure and the violator is not willing to correct the problem voluntarily, OCR can refer the case to the Civil Rights Division, which can sue the violator in court, or OCR can seek a cut-off of federal funds to the violator through a proceeding before an administrative law judge. *See* H. Rep. 458 at 2-3.

In the 1960s, when OCR's enforcement activities began pursuant to Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d *et seq.*, OCR's efforts focused largely on school systems in the South which had failed or refused to achieve desegregation. Hundreds of administrative actions were begun to defer or terminate funds, in addition to lawsuits brought by the Civil Rights Division. These efforts produced dramatic results. By 1966, desegregation had begun in virtually every rural southern school district, most of which had previously been totally segregated. Although 98 percent of black children in the eleven states in the deep South still attended all-black schools in 1964, fewer than 9 percent attended such all-black schools by 1972.[16]

In 1969, however, the attorney general and the secretary of HEW, who was then in charge of OCR, announced a new policy which minimized the number of cases in which federal funds would be cut off due to civil rights violations, and which postponed previous administrative deadlines for desegregation in southern school systems. *See* H. Rep. 458 at 4. In 1970, a federal court complaint was filed in the case of *Adams v. Richardson*, contending that as evidenced by the 1969 policy change, OCR had begun systematically to fail to enforce prohibitions against federal assistance to segregated and discriminatory schools and other institutions. *Id.* at 4-5.[17]

The *Adams* litigation has had a major impact on OCR enforcement activities. In 1972-1977, the court in *Adams* issued a series of orders finding that OCR was failing to carry out its enforcement responsibilities and requiring specific relief. This relief included orders mandating that OCR begin administrative enforcement proceedings against specific school districts and other institutions and requiring that OCR handle complaints and compliance reviews according to specified timeframes in order to prevent serious delays which were impeding effective enforcement.[18] Although *Adams* originally focused on OCR enforcement with respect to racial segregation and discrimination against blacks, the case was expanded to include discrimination issues with respect to Hispanics, women, and disabled students, in 1976 and 1977.[19]

In 1977, OCR and the plaintiffs in *Adams* negotiated a settlement and consent decree which incorporated the previously ordered timeframes and adopted reporting and other requirements.[20] Efforts to comply with the consent decree between 1977 and 1980 were generally successful, and the backlog of pre-order cases was almost eliminated.[21] While problems with civil rights enforcement remained, as of 1980 both OCR and the Civil Rights Division appeared committed to effective action with respect to civil rights enforcement in elementary and secondary education.

III. Federal Civil Rights Enforcement and Policy in Elementary and Secondary Education Since 1981: Findings and Conclusions

A. Summary and Overview

Since 1981, federal civil rights enforcement in elementary and secondary education has deteriorated dramatically. The Division has filed only four new suits challenging segregation or inequality of educational opportunity in more than seven years, and has begun no new enforcement action at all in such critical areas as metropolitan desegregation. Instead, it has focused on trying to dissolve injunctions against discrimination and to dismiss desegregation cases filed before 1980; in fact, the Division has tried to dismiss desegregation cases against more than twice the number of school districts than it has filed new suits since 1981. OCR has similarly failed to comply with judicial and administrative guidelines for processing complaints, debilitated important civil rights surveys, avoided conducting compliance reviews, and even resorted to backdating documents and persuading victims to drop complaints in order to appear to meet enforcement deadlines. OCR and the Department of Education have also failed to fulfill their responsibilities in enforcing laws prohibiting sex discrimination and in ensuring that educational opportunities are provided to limited English speaking students.

Since 1981, federal civil rights enforcement in elementary and secondary education has deteriorated dramatically

Both the Division and OCR have failed to pursue effective remedies for discrimination, often agreeing to settlements which effectively permit civil rights violators to police themselves with no further monitoring and enforcement. Contradicting Supreme Court precedent, the Division has opposed remedies which require desegregation or utilize busing, even when the school districts involved support those remedies, and has failed to seek necessary financial support for magnet and other alternative programs. The Division has attacked legal principles which Division attorneys themselves helped establish under previous Republican and Democratic administrations. Indeed, the Division has even switched sides in pending Supreme Court cases, leading it to attack voluntary desegregation in Seattle, oppose efforts to provide educational opportunities for children of undocumented aliens, and support IRS tax exemptions for discriminatory private schools.

In short, as the United States Commission on Civil Rights concluded in 1983, the federal government has "reversed enforcement policies pursued for nearly a quarter of a century by Republican and Democratic administrations alike."[22] This reversal has done much much more than simply fail to promote desegregation and equality of educational opportunity. Instead, the evidence suggests that school desegregation and inequality have grown worse during the 1980s.[23] As the United States moves into the 1990s, it is critical that the national bipartisan commitment to effective civil rights enforcement in education be restored.

The remainder of this analysis specifically reviews civil rights enforcement in elementary and secondary education by the Division and by the Department of Education during the 1980s. Analysis of the Division's activities focuses on initiation of new cases, seeking remedies for violations of the law, and termination of litigation, including such issues as metropolitan desegregation, busing, and magnet schools. Analysis of the Department of Education and OCR concentrates on the complaint review process, civil rights surveys and compliance reviews, combating segregation within schools, ensuring compliance with laws against sex discrimination, and the issue of bilingual education.[24] Specific recommendations are included with respect to each subject, and are summarized in Section IV.

B. The Civil Rights Division

1. Initiation of new cases

The filing of new lawsuits to challenge school segregation and inequality of educational opportunity in elementary and secondary education has slowed to a virtual crawl since January, 1981. The Division has filed only four new cases since that time, including only three desegregation cases, and one case which was nothing more than a filing in court--along with a consent decree--to embody the terms of a settlement with OCR at the school district's request.[25] This is substantially less than the number of new cases filed during any similar previous seven-year period; indeed, it is less than one-tenth the number of cases filed during 1966 alone.

The Division leadership has claimed that the small number of new cases is due to the progress that has been made in school desegregation since *Brown v. Board of Education.*[26] The dismal statistics discussed in Section I above concerning racial segregation in the 1980s, however, make it clear that much more remains to be done. In the twelve months prior to January 1981, moreover, four new desegregation suits were started, but the Division filed no new complaints at all for the next two years and only three in seven years.[27] As of 1985, the Division had eleven investigations of possible complaints pending --more than twice the total number of complaints filed in over seven years.[28] Congressional reports and statements by former Division attorneys, moreover, indicate that the Division has failed or refused to act on a number of cases referred to it by OCR and has slowed or abandoned investigations and possible complaints across the country, such as in Rochester, New York and Albuquerque, New Mexico.[29]

The Division's failure to undertake new enforcement activity is particularly troubling with respect to the issue of metropolitan desegregation. The evidence is clear that interdistrict school desegregation involving both central cities and suburbs offers the best hope for achieving stable, effective integration.[30] The Division had supported metropolitan desegregation in earlier years, as in Indianapolis, and was prepared to file an interdistrict suit in St. Louis in early 1981.[31] Yet the Division failed to file such a complaint in St. Louis, refused to take a position on the issue when the NAACP and the city school board pursued desegregation claims against the St. Louis suburbs, and then opposed portions of a settlement which called for voluntary student transfers between the city and the suburban districts.[32] The Division abandoned an earlier effort to seek a metropolitan remedy in Houston, Texas following a lower court dismissal of its case in 1981.[33] In Milwaukee, where the city school board and the NAACP filed suit against suburban districts in 1984, the Division remained uninvolved.[34] And in

Little Rock, Arkansas, where private plaintiffs and the city school board sought metropolitan remedies, the Division filed an unsuccessful *amicus curiae* brief opposing any interdistrict relief whatsoever.[35]

Another area where new enforcement activity should be explored concerns the interaction between school and housing segregation. The Supreme Court has long recognized that segregated housing contributes to segregated schools and vice versa, and a number of courts have ruled that government actions which lead to segregated housing can provide the basis for school and housing desegregation remedies.[36] Indeed, since 1981, the Division has continued to pursue the landmark case of *United States v. Yonkers*, in which segregative government-subsidized housing policies formed a large part of the basis for housing and school desegregation relief ordered by the Court.[37] The Division has not begun other schools-housing cases, however, and opposed an interdistrict remedy based on housing segregation in the *Little Rock* case.[38] School segregation remains a serious problem in many metropolitan areas, and discrimination in housing has undoubtedly helped cause and reinforce such segregation. Both with respect to individual municipalities and metropolitan areas across the country, the close interaction between school and housing segregation offers a promising avenue for breaking down the barriers of racial isolation.

Accordingly, it is *recommended* that the Division significantly increase its efforts to investigate and file new cases to combat the continuing problems of school segregation and inequality of educational opportunity, focusing its efforts on cases attempting to achieve metropolitanwide desegregation, and to pursue the link between segregated housing and segregated schools.

2. *Seeking remedies for illegal segregation and denial of educational opportunity*

Prior to 1981, the Division itself helped establish some of the key principles which govern the provision of relief against school segregation. Chief among these is the rule that a defendant guilty of segregation must take immediate, affirmative steps to eliminate all vestiges of segregation. *Green v. County School Board*, 391 U.S. 430, 438, 439 (1968). While voluntary transfers and magnet schools may be utilized as part of a desegregation remedy, the Supreme Court has specifically ruled that a purely voluntary "freedom of choice" approach with no enforcement mechanisms is "unacceptable" where there are alternatives offering "speedier and more effective" relief. *Id.* Such remedies can and should include compensatory and remedial education programs to help eliminate the damaging educational vestiges of segregation. *See Milliken v. Bradley*, 433 U.S. 267 (1977). They must also include consideration of the use of student reassignments and busing where necessary and appropriate, the Court has held, since desegregation plans "cannot be limited to the walk-in school." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 29 (1971).

Since 1981, the Division has refused to follow these principles. This refusal consists of much more than opposition to busing by the Division's leaders. It includes active opposition to and refusal to seek *any* remedy which specifically requires desegregation, reliance on purely voluntary plans regardless of their effectiveness, refusal to seek necessary funding to support voluntary plans and compensatory programs, and refusal to seek systemwide desegregation remedies. These policies contradict the bipartisan civil rights enforcement record prior to 1981 and have contributed significantly to the lack of progress in combating racial isolation and inequality of educational opportunity.

a. Opposition to use of mandatory student reassignment plans

The Division's leadership has unequivocally repudiated the use of mandatory student reassignment plans or "busing" to help achieve desegregation under all circumstances.[39] This policy directly contradicts the Supreme Court's pronouncement that any "absolute prohibition against use of [mandatory reassignment]--even as a starting point--contravenes the implicit command of *Green v. County School Board* . . . that all reasonable methods be available to formulate an effective remedy." *North Carolina State Board of*

Educ. v. Swann, 402 U.S. 43, 46 (1971). As the Court has recognized, in many school systems "it is unlikely that a truly effective remedy could be devised without continued reliance upon [busing]." *Id.*

This judicial recognition is confirmed by experience. Where properly planned and implemented, mandatory reassignment plans have succeeded in promoting effective desegregation across the country. A 1987 survey showed that the states and metropolitan areas with the "greatest integration of black students typically have extensive court orders requiring busing."[40] In Charlotte, North Carolina, where the Supreme Court specifically approved mandatory reassignment in 1971, residents have called the city's desegregated school system "one of the nation's finest" and Charlotte's "proudest achievement."[41] As demonstrated by experience in Charlotte and other cities, as well as by national polling data, most parents support such plans once they have begun and problems of "white flight" due to desegregation are generally minimal.[42] Just as with the many more students who are bused for reasons unrelated to desegregation, such plans do not involve excessive time or distance and protect students' health, safety, and welfare.[43] Indeed, compelling evidence shows that black student achievement has significantly improved in desegregated schools, that white students' achievement has either improved or stayed the same, and that desegregation plans can also improve employment opportunities and housing integration.[44] The courts have used mandatory transportation remedies only where necessary and where other methods of desegregation have failed.[45] When properly used, however, such plans achieve successful and effective desegregation "that is unattainable through other means." H. Rep. 12 at 19.

Since 1981, however, the Division has gone even further than refusing to ask for or support such remedies. It has actively opposed and sought to limit or terminate such plans, even where the school district affected disagrees with the Division. A prime example was in Seattle, where the local school district had *voluntarily* begun a reassignment plan to promote integration. When a statewide initiative was passed in the 1970s prohibiting such plans, the Division initially joined the school district in successfully arguing to the lower courts that the initiative was unconstitutional. The lower courts found that the initiative created an impermissible racial classification by allowing busing for all purposes except desegregation, was tainted by discriminatory intent, and made it impossible for Seattle to effectively eliminate segregation.[46] When the case reached the Supreme Court in 1981-82, however, the Justice Department switched sides, rejected its own prior arguments, and argued against Seattle that the initiative was constitutional.[47] The Supreme Court rejected these arguments and ruled that the initiative was unconstitutional, thereby upholding the Seattle plan.[48]

A series of other cases further exemplifies the Division's recent policy. In the Nashville case, the Justice Department sought Supreme Court review of an appellate court decision refusing to permit major modifications to a desegregation plan.[49] The Supreme Court declined review of the Nashville case without a single dissenting vote, rejecting the government's apparent attempt to urge reconsideration of *Swann* and other cases upholding the use of mandatory reassignment.[50] In cases in Beaumont, Texas and Kansas City, Kansas, the Division dropped appeals of desegregation orders it had previously filed largely because, according to the former Division attorney assigned to the cases, the Division did not want to seek further remedies involving mandatory student reassignments.[51] The result was that many black students in these districts remained in segregated schools with no remedy.[52]

A particularly disturbing example was in East Baton Rouge, Louisiana. In that case, the Division again switched sides and urged a lower court to replace a mandatory desegregation plan with voluntary measures. This was despite the fact that the Division had previously advocated a more extensive plan than the one it sought to replace, and that the Division's own consultant agreed that the voluntary plan would be less effective than the existing remedy and would allow racial segregation to continue.[53] Mandatory remedies were ordered in East Baton Rouge only after twenty years of resistance by the school board to desegregation, and a specific finding by the court that the board's conduct was a classic example of the "litany of failure by local white elected officials to discharge their constitutional responsibilities."[54] The local board was thus understandably encouraged when the Division appeared to take its side in opposing mandatory desegregation, even to the extent of reassigning Division attorneys who had previously argued for extensive desegregation in the case.[55] Yet the board failed even to approve the voluntary measures suggested by the Division and continued instead to oppose desegregation, forcing the Division to hastily withdraw its suggestions.[56]

When the nation's chief civil rights enforcement office switches sides and appears to reward the recalcitrance of local officials, as in East Baton Rouge, the result can only be to rob the Division of its credibility with the courts and encourage the very "failure of leadership, courage, and wisdom on the part of local officials" which necessitated mandatory remedies in the first place. *Davis, supra*, 514 F. Supp at 871. Similarly, by removing even the threat of the Division's most effective remedies against districts guilty of segregation, the Division's rigid antibusing policy eliminates much of the incentive to undertake voluntary efforts and further encourages defiance. By giving comfort to continued resistance to desegregation and by failing to promote effective and responsive local leadership, the Division makes it much more difficult for desegregation to succeed. Even more than the impact of its actions in particular cases, it is this more subtle effect of the Division's policies which may most seriously damage effective civil rights enforcement in education. It is accordingly *recommended* that the Division end its rigid opposition to the use of mandatory transportation as a remedy in school desegregation cases, and return to its previous policy of considering the use of all available remedies and supporting relief which will be most effective in individual cases.

b. Reliance on purely voluntary measures and opposition to enforceable relief

Since 1981, the Division has sought to rely solely on voluntary methods in desegregation cases, such as magnet schools to encourage integrative transfers, without enforcement or backup mechanisms if such methods do not achieve desegregation. This is in accord with the philosophical position of the Division's leadership that a school district's obligation is simply to refrain from hindering whatever degree of integration may naturally occur on its own, and that the Division will not seek to "compel children who do not want to choose to have an integrated education to have one," even where there has been a history of enforced segregation.[57]

This philosophical view, however, has been expressly rejected by the Supreme Court. Where a defendant is guilty of unconstitutional school segregation, damaging the education of minority students and engendering racial segregation and divisiveness in a community, it cannot simply step aside and shift to parents and children the responsibility to desegregate voluntarily. Nor can it fulfill its obligations by simply behaving in the future in good faith and without discriminatory intent. Instead, the Court has held, the defendant has the "affirmative duty" to take "whatever steps might be necessary" to actually eliminate segregation and its vestiges to the maximum extent practicable.[58] Since the Supreme Court rejected "freedom of choice" plans in *Green*, the courts have consistently held that purely voluntary magnet or other programs cannot be the sole technique used to remedy segregation.[59]

Magnet schools and similar programs which offer incentives for voluntary integrative transfers can play an important role in achieving desegregation. When used alone and with no provision for enforcement, however, research demonstrates that such voluntary programs are ineffective.[60] In addition, serious questions about equity and fairness have been raised in districts employing magnet schools. A recent report has concluded that in several cities, magnets have produced stratified school systems that effectively consign low-income and at-risk students to inferior, nonmagnet schools with few resources and little chance of excellence.[61]

The Division has relied heavily on purely voluntary measures in litigating and settling cases with school districts since 1981. An early example was in Chicago. In 1980, the Division and the Chicago school board entered into a consent decree which required the district to propose a comprehensive desegregation plan in March, 1981, to be implemented beginning in September. The board missed the first deadline and, in response to a court order, filed a subsequent plan. That plan postponed most compliance until 1983, and defined a 70 percent white school as adequately desegregated, even though the district as a whole was only 20 percent white. The Division initially objected to the plan. One month later, however, the Division reversed its position, withdrew its opposition, effectively agreed to permit the district to remain in violation of the consent decree, and asked the court to refrain from even ruling on the adequacy of the school district's proposed guidelines.[62] Not surprisingly, desegregation in Chicago has not succeeded, and the Chicago public schools remain among the most segregated in the country.[63]

Even more demonstrative of the Division's policy have been the consent decrees and settlements which the Division has entered into beginning in 1981. For example, in 1984 the Division simultaneously filed and entered into a consent decree to settle a case against the Bakersfield, California school district. OCR had previously found that the district had committed pervasive, intentional acts of discrimination in segregating black and Hispanic students, and referred the case to the Division because it concluded that an effective remedy would require a court order mandating some reassignment and additional busing of students.[64] Yet the Division agreed to a settlement involving no such remedies, relying instead only on magnet schools and other voluntary measures. In addition, the consent decree did not call upon the district to achieve any specific level of desegregation or provide for any effective method of enforcement. Instead, it simply called for a "good faith effort" by the district, and provided that the case could be dismissed within three years if such an effort was made, regardless of the degree of segregation remaining in the schools.[65] The Division specifically acknowledged that *Bakersfield* could comply with the decree even if its schools continued to be segregated.[66]

The *Bakersfield* consent decree was severely criticized as ineffective and a "blueprint" for segregation.[67] In fact, the district's first report on the plan revealed that all ten schools which were intentionally segregated and racially identifiable before the plan continued to be racially identifiable after implementation, including three schools which remained 90 percent or more minority and one school which became even more segregated after the plan began.[68] Even as of 1987-88, four years after the *BakersfieldD plan was adopted, five of these ten schools remain racially* identifiable.[69] Nevertheless, *Bakersfield* has announced that it intends to seek termination of the consent decree and dismissal of the case, and virtually identical consent decrees relying solely on voluntary measures and containing no effective enforcement or desegregation standards were entered by the Division in other cases, such as in *Lima, Ohio*, and *Phoenix, Arizona*.[70]

No one representing the victims of segregation could object to the consent decrees in cases like *Bakersfield* and *Phoenix*, since only the Division and the school districts involved were parties to these cases. Indeed, the Division has sought to prevent civil rights groups from participating in its cases; for example, the Division opposed participation by the NAACP Legal Defense Fund on behalf of minority children in the *Charleston* case, even though the defendant school board itself did not oppose intervention by a black parents' group, and the head of the Division reportedly instructed line attorneys to make "those bastards . . . jump through every hoop" to become party to the case.[71] In the Hattiesburg, Mississippi case, however, where a plaintiff representing minority students was in the case and objected to a proposed consent decree between the Division and the school district similar to those in *Bakersfield* and *Phoenix*, the court of appeals specifically rejected the consent decree as inadequate.[72] This decision confirms the serious problems raised by the Division's reliance on totally voluntary, unenforceable methods, particularly in cases where no other parties are present to defend the rights of minority school children.[73]

In fact, the Division has even opposed totally voluntary desegregation measures because some effective method of enforcement was included. In the St. Louis case, the NAACP, the city school board, and the suburban districts all agreed on a plan in 1983 to settle claims of metropolitan segregation. The plan called for totally voluntary transfers of minority city students to suburban districts, but also allowed the plaintiffs to go back to court against suburbs which had not achieved agreed-upon levels of integration in five years. Even though all transfers were totally voluntary and no mandatory reassignment was involved, the Division opposed the plan, arguing that a "good faith" effort should be enough and that no further method of enforcement should be provided.[74] The court rejected the Division's arguments and approved the settlement, which has led to significant numbers of interdistrict transfers and has not required further enforcement action against any suburban districts.[75]

As the St. Louis case illustrates, voluntary desegregation measures can succeed where they are part of an overall desegregation effort and where there are enforcement or back-up measures to encourage voluntary methods to work. Otherwise, however, purely voluntary measures are ineffective, potentially unfair, and in violation of accepted principles of desegregation law. It is accordingly *recommended* that the Division employ magnet schools and other voluntary desegregation methods, both in settling and litigating cases, only where they are part of an overall desegregation effort including effective enforcement or backup measures and will not impair educational opportunities of children in nonmagnet schools. Division policy should seek to effectuate the principle established by the Supreme Court that affirmative steps must be taken to eliminate school segregation and its effects to the maximum extent practicable.

c. Refusal to seek, and opposition to, necessary funding for effective desegregation and equality of educational opportunity

In order to be successful, magnet schools and similar voluntary measures require additional funding for enhanced educational programs and facilities as well as transportation to attract parents and students to desegregated schools.[76] In addition, the Supreme Court has recognized that segregation has damaging long-run educational consequences, which may require compensatory and remedial educational programs as well as physical desegregation to achieve full relief.[77] The Division itself has similarly recognized that inequalities in the "tangible components of education" between minority and white students should be remedied.[78]

In fact, however, the government has been unwilling since 1981 to provide or support the provision of the funding necessary to make magnet and other voluntary programs work, even though it has advocated such voluntary measures, and to offer equal educational opportunity.[79] In Chicago, for example, the settlement plan relied heavily on magnet schools. When necessary federal funds to support such programs were eliminated, Chicago had to go to court for an order freezing education department funds until the money promised by the federal government was provided. A congressional bill to provide such funding was vetoed, and the court had to virtually hold the Justice Department in contempt before the government agreed to provide money for the plan.[80]

An example relating to equal educational opportunity outside the specific context of desegregation is presented by *Plyer v. Doe*, 457 U.S. 202 (1982), in which the Supreme Court ruled that it was unconstitutional for Texas to deny a free public education to children of undocumented aliens. Prior to 1981, the Division participated in the case at the lower court level and argued successfully that Texas' actions unconstitutionally denied equal opportunity to such children. When the case reached the Supreme Court after 1981, however, the Justice Department abruptly changed its position and stated that it would express no view on the constitutionality of Texas' conduct. As one former Division attorney has explained, in addition to failing to support equal educational opportunity, this switch in position "damaged the Department's credibility both with the Court and with the public."[81]

In a growing number of cases in recent years, minority citizens and city school boards have sought funding from state governments for compensatory programs, magnet schools, and other measures, based upon the Supreme Court's ruling in the *Milliken II* case that courts can require such remedies to be funded by state governments which have contributed to school segregation.[82] This development offers an important method for helping provide effective remedies for school segregation and inequality of educational opportunity, which are often beyond the fiscal capacity of local school districts.

Rather than supporting or seeking such relief, however, the Division has opposed it. In St. Louis, for example, the Division objected to a lower court order which required Missouri to help fund voluntary magnet programs, educational improvements for minority students, and voluntary integrative transfer programs.[83] The Court of Appeals questioned the propriety of the Division's actions, rejected its arguments, and approved state funding.[84] In the *Yonkers* case, the NAACP and the local board have filed a similar claim seeking state participation in necessary compensatory and remedial education programs, but the Division has opposed the claim.[85]

In general, federal funding for compensatory education and desegregation has decreased significantly since 1980. For example, between 1980 and 1986, spending for the Chapter I compensatory education program decreased by 23 percent, serving 500,000 fewer students.[86] As of 1987, Chapter I served two million fewer students than in 1980.[87] The administration successfully persuaded Congress in 1981 to eviscerate the Emergency School Aid Act, reducing the funds available for magnet schools and other desegregation programs.[88] For 1987 and 1988, the Department of Education requested a rescission of all $24 million appropriated to provide desegregation assistance under Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c.[89]

Adequate funding is critical to success, particu-larly with respect to voluntary desegregation measures which the Division has supported. It is accordingly *recommended* that the Division and the government support the provision of funding necessary for magnet schools and other voluntary desegregation programs and for compensatory and remedial education programs. In particular, the Division should seek and support remedies pursuant to *Milliken II* which require state governments to help fund magnet, compensatory, and remedial programs to assist in remedying the vestiges of segregation.

d. Refusal to seek systemwide remedies

In *Keyes v. School District No. 1*, 413 U.S. 189 (1973) a case concerning segregation in the Denver public schools, the Supreme Court established the important principle that where a substantial portion of a school district is segregated, there is a presumption that racial imbalance in other schools in the district is due to segregation, and that a systemwide remedy should be ordered encompassing all schools. As the Court explained, "common sense dictates" that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions," and systemwide relief is often necessary to eliminate all vestiges of such segregation.[90]

Nevertheless, the Division's leadership repudiated *Keyes* in 1981. It announced that it would not utilize the *Keyes* presumption in initiating litigation and would "seek to limit the remedy only to those schools in which racial imbalance is the product of intentionally segregative acts."[91] Although it is difficult to trace specific Division actions to this shift in policy, former Division attorneys and other observers have suggested that it has played an important role in the decision not to seek further relief in the Kansas City case and in the low number of new cases begun by the Division.[92]

In addition to these problems, the *Keyes* policy shift has potentially critical implications for achieving effective relief in desegregation cases. Ordering remedies in only part of a system where segregation has occurred may well encourage residential instability and "white flight" within a district by effectively permitting those opposed to desegregation to transfer elsewhere. Meaningful desegregation may often be impossible if only a fraction of a district is involved, particularly in light of the effects of segregative acts throughout a district, as the Supreme Court has recognized. Accordingly, it is *recommended* that the Division seek systemwide relief in its cases in accordance with *Keyes*, and that the Division fully utilize the principles of *Keyes* in initiating and conducting school desegregation litigation.

e. Reversal of opposition to tax exemptions for discriminatory private schools

Problems arose concerning private schools which discriminated against minorities and served as havens for "white flight" from desegregation, particularly as desegregation of public schools increased in the 1960s. In 1971, the Supreme Court affirmed the issuance of an injunction prohibiting the IRS from granting tax exemptions to such discriminatory private schools. *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd*, 404 U.S. 997 (1971). Although the injunction in *Green* formally applied only to schools in Mississippi, the IRS had extended the policy to all private schools.

When several private schools later challenged the IRS policy, the Justice Department vigorously defended it, and the lower courts ruled that the IRS policy properly denied tax exemptions to discriminatory private schools. In the most publicized of its shifts on civil rights issues, however, the Department reversed itself when the case reached the Supreme Court and took the position that the IRS did not have the authority to deny such tax exemptions. This was despite the vigorous opposition of many career attorneys and the government's own characterization of the schools as "blatantly discriminatory."[93] In *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Supreme Court specifically rejected the Department's new arguments and upheld the IRS' policy. *Id.* at 585 n.9. Once again, the Department's credibility and reputation were severely damaged.[94]

Although the specific issue in *Bob Jones* is unlikely to recur, the issue of discriminatory private schools warrants continued attention in the context of the Division's future desegregation efforts. In some areas, private schools may still be utilized to attempt to avoid desegregation. The courts have specifically noted, for example, that segregation may be fostered by state laws which facilitate transfers to private schools through such methods as subsidizing transportation costs.[95] States such as Ohio have adopted rules to try to combat such problems.[96] It is accordingly *recommended* that the Division support methods at the state, local, and federal level to combat discrimination by private schools and to prevent the use of private schools to avoid desegregation, including requesting court orders in desegregation cases litigated by the Division.

3. *Termination of litigation: the issue of unitary status*

Once a court has found illegal segregation in a school district, the Supreme Court has ruled, the court should retain jurisdiction over the district until it has desegregated and achieved "unitary status."[97] While the definition of unitary status continues to evolve on a case-by-case basis, the Court has indicated that in order to be unitary, a district must eliminate the vestiges of segregation to the maximum extent practicable with respect to student and teacher assignment, school facilities, and other aspects of its operation.[98] The Court has also suggested that such vestiges may include the lingering educational deprivations to minority students caused by segregation, and that school segregation may also contribute to residential segregation.[99] Ordinarily, a school district itself seeks a declaration of unitary status, and removal of court jurisdiction, when it believes that it has desegregated and wishes to operate without court supervision.

Since 1981, however, several important shifts in Division policy have occurred with respect to the issue of unitary status. In accord with its view in cases like *St. Louis* and *Bakersfield*, the Division specifically argued in the Denver case, for example, that a school district's good faith implementation of a desegregation plan, no matter how ineffective, should be enough to achieve unitary status and end a court's remedial supervision.[100] The court in Denver did not accept this position, which is flatly inconsistent with the Supreme Court's holding that compliance with desegregation is measured by the effectiveness of a remedy, not the degree of good intentions.[101] It is accordingly *recommended* that the Division adhere to the principle that a school district can be declared unitary only if it has actually eliminated all vestiges of segregation to the maximum extent practicable, including harmful educational and residential segregative effects of school segregation.

The Division's policy shift has gone even further, however. In a number of school districts in Georgia, against which the Division had previously filed desegregation suits, the Division has itself taken the burden of starting proceedings to have the school districts declared unitary and to dismiss injunctions against further discrimination. This is despite the fact that none of the districts involved requested such action, that complaints with OCR have recently been filed against several of the districts, and that most of the districts themselves have opposed the proposed action after objections were filed by the minority plaintiffs participating in the cases.

Specifically, in late 1987, the Division contacted a number of districts which were defendants in the *United States v. Georgia* litigation filed in 1969. After initial implementation of desegregation plans, those districts had been operating pursuant to an injunction issued in 1973 prohibiting future segregation or discrimination and placing the cases on the Court's inactive docket subject to reactivation if necessary.[102] Without consulting the plaintiffs representing black students in the districts, the Division proposed that stipulations be filed dismissing the districts altogether. A number of districts agreed. On February 3, 1988, the Division wrote to the Court submitting such stipulations calling for the cases to be dismissed against eight specific school districts. On the same date, the Division notified the private plaintiffs of its actions for the first time, sending them a copy of the proposed stipulations it had filed.[103] On February 23, 1988, without the consent of the plaintiffs, the Division formally asked that the Court enter the stipulations and dismiss the cases within thirty days.[104]

The private plaintiffs objected, noting that they had not been consulted earlier, that no supporting brief had been filed by the Division as required by local rules, and that no discovery and court proceedings had ever been held to determine that the districts were in fact unitary.[105] Research also revealed that complaints of discrimination had recently been filed against several of the districts with OCR, and that OCR had issued a finding in 1987 that one of the districts had discriminated against black students by assigning them improperly to racially identifiable classes.[106] Within weeks, most of the districts withdrew their agreement to cooperate with the Division in light of the plaintiffs' objections and requests to begin discovery proceedings.[107] One district specifically noted that it had initially agreed to cooperate because the Division had indicated, apparently without foundation, that there were no objections by the private plaintiffs to dismissal of the cases.[108]

Despite the fact that most of the school districts themselves no longer agreed, the Division has persisted in its position. In fact, the Division has even rejected a compromise suggested by the court and agreed to by the plaintiffs and a number of the school districts, under which the cases would be dismissed but the injunctions against segregation and discrimination would remain in effect.[109] The Court has derided the Division's position, noting that it is "totally inconsistent with the old adage 'if it ain't broke, don't fix it,'" and has ruled that the Division may continue to press its claims only if the Division--which initially sued the Georgia districts--now agrees to represent these defendants without expense in all discovery and other proceedings.[110] The issue remains pending as of this date in *United States v. Georgia*, but the Division has clearly indicated that it is interested in initiating similar proceedings in other cases.[111]

This latest action by the Division raises serious problems. In *United States v. Georgia* alone, the Division has sought to end desegregation cases against more than twice the number of school districts that it has filed new cases against in over seven years. There is no reason why districts themselves cannot initiate dismissal proceedings where appropriate, and no reason why the Division should use its scarce resources to do so where the districts themselves do not. The Division should not support a determination of unitary status with respect to districts against which there are recent or unresolved complaints of discrimination, and should not agree to a unitariness finding without even consulting all parties. In addition, there is no reason to oppose continuing injunctions against discrimination and segregation as in *United States v. Georgia*, since such measures may well deter future violations and make it easier to obtain relief if they do occur. Indeed, one appellate court has ruled that even after a district has been declared unitary, it must demonstrate that changed circumstances warrant modifying or eliminating an injunction calling for desegregation.[112]

Accordingly, it is *recommended* that the Division should return to its previous practice of not initiating attempts to have a school district declared unitary, and thus dismiss desegregation claims against it. The Division should consult specifically with OCR and all parties to a case before deciding what position to take with respect to a request to declare a district unitary or dismiss a case, and should not support such a request where there are recent or unresolved complaints of discrimination, or vestiges of segregation, which can be eliminated by further action. Where cases are to be dismissed, the Division should explore the possibility of keeping in place injunctions which prohibit future discrimination or call for the continuation of desegregation plans where necessary. The Division should also support the principle that where an injunction calling for desegregation has been entered, the defendant must bear the burden of proving changed circumstances sufficient to justify modifying or eliminating the injunction.

Following such recommendations, as well as the other recommendations in this section, can help restore our nation's bipartisan commitment to vigorous civil rights enforcement in education through the Civil Rights Division.

C. The Department of Education and the Office of Civil Rights

1. Processing of complaints

One of OCR's major activities is the handling of complaints of discrimination against individual school districts and institutions. Although the number of such complaints has declined during the 1980s, OCR's complaint processing efficiency has also declined, and OCR has consistently been unable to meet the timeframes called for in the *Adams* order.[113] In fact, in 1987, a House subcommittee found a "nationwide scheme" in OCR offices to backdate documents and persuade victims to drop discrimination complaints in order to appear to meet the *Adams* timeframes.[114]

In addition to scarce resources, several causes of these problems have been suggested. Initially, OCR has apparently failed to use all funds appropriated for its enforcement activities; for example, over $20 million appropriated between fiscal years 1980 and 1985 was either returned to the Treasury or spent on activities not related to OCR operations.[115] It is accordingly *recommended* that OCR seek to expend properly all funds appropriated for its enforcement activities and request additional funding as necessary.

In addition, complaint processing has been slowed and disrupted by placing complaints on hold in many cases. For example, a 1986 OCR review revealed that officials in five OCR regional offices routinely delayed processing of cases because of reasons such as alleged unavailability of witnesses, even where in fact there was no adequate basis for such delays, and that monitoring of this process was inadequate.[116] In a number of instances in the early 1980s, OCR suspended processing of complaints altogether in cases in which OCR general policy changes were under consideration.[117] It is accordingly *recommended* that additional monitoring and guidelines be instituted to avoid improperly suspending or delaying the processing of OCR complaints and to help promote compliance with the *Adams* timeframes. This may include modifying or providing additional flexibility in meeting such timeframes in some types of cases, such as complex, multi-issue, multiparty cases. Any changes in the *Adams* timeframes should be accomplished through notice and comment rulemaking by the Department. Efforts should also be made to improve the efficiency of case processing where possible without compromising quality.[118]

Reports indicate that OCR enforcement activity both with respect to complaint investigations and other efforts is hampered by the lack of clear, written policy guidance to regional offices.[119] Accordingly, it is *recommended* that OCR promulgate and distribute policy directives on civil rights enforcement issues on a timely basis consistent with applicable law, to OCR regional offices and the general public.

Another possibility may be for OCR to develop relationships with state civil rights agencies to help handle, under OCR supervision and guidelines, some categories of complaints. Attempts at joint federal-state handling of civil rights complaints have succeeded on a limited basis with respect to OCR and the EEOC, particularly with respect to individualized and relatively routine and repetitive complaints.[120] In addition to helping cope with the complaint workload, such measures could help OCR concentrate more resources on compliance review activities which, as discussed in Section 2 below, can potentially provide much more effective enforcement by OCR. Federal-state activities in the civil rights area must be conducted carefully, however, since there is a serious danger of improper federal reliance on state agencies which may be unreliable.[121] Accordingly, it is *recommended* that OCR analyze and develop proposals for possible joint OCR-state handling of individual complaints now processed by OCR.

2. Initiating and conducting compliance reviews

There is strong evidence that complaint investigations by OCR are generally a less effective means of civil rights enforcement than compliance reviews started by OCR itself. OCR has found that compliance reviews produce twice as many remedies and benefit six times as many discrimination victims as complaint investigations.[122] In addition, such reviews are critical in enforcing the rights of poor, undereducated, and non-English speaking persons, who are least likely to file complaints but often most likely to suffer from discrimination.[123] Despite the decline in complaints during the 1980s, however, compliance reviews also declined, and still remain a "small part of OCR's enforcement program.[124] In 1982, for example, OCR conducted reviews covering only about 8 percent of districts or institutions which were "apparently in severe noncompliance" with civil rights laws.[125]

In deciding which school districts to review for civil rights compliance, OCR has previously relied heavily on its semiannual civil rights surveys of school districts begun in 1968, which collect information on such subjects as the racial makeup of schools and classrooms, assignments to gifted and special education classes, and disciplinary actions. From 1978 through 1982, the surveys were conducted so that all districts with enrollments over three hundred were surveyed comprehensively at least once during the six-year cycle, with districts of high interest surveyed every two years, minimizing the burden on school districts but providing complete and useful data for OCR.[126]

In 1984, however, OCR changed the civil rights survey and seriously reduced its usefulness. It abandoned its 1978-82 survey strategy, using instead a stratified random sampling of districts and allowing large districts to sample only some of the schools within their systems. These changes mean that the survey will miss thousands of schools and school districts, making it extremely difficult to select targets for compliance reviews effectively.[127] For example, even though OCR has eliminated the large district sub-sample procedure and sought to include more districts not surveyed recently in 1988, it is estimated that about two thousand districts surveyed in 1978-82 will be bypassed in the six-year period through 1988, and that about seven thousand mostly small districts will not have been included since 1976.[128] A comprehensive resurvey of all school districts may be needed by 1990 in order to restore the usefulness of the data base.[129]

In addition, failing to survey high interest districts every two years makes it quite difficult to monitor districts which warrant special attention. OCR also altered its vocational education survey, in 1984, in a manner which seriously impairs its usefulness, by including schools over which OCR has jurisdiction or which are not vocational schools and omitting schools which are needed to provide useful data.[130]

Selection of sites for compliance reviews has also been limited by questionable OCR policies. In a 1987 memorandum to its regional offices, OCR stated that compliance reviews should not be undertaken in districts which are subject to court or OCR-approved desegregation plans, and discouraged compliance reviews of institutions requesting technical assistance from OCR.[131] Such policies leave hundreds of districts, including many which have committed civil rights violations in the past, effectively exempt from compliance reviews.[132]

OCR has also failed to use its authority under the federal magnet school program effectively to gather and evaluate potentially key information to serve as a further guide for determining compliance with civil rights laws. In order to receive federal funds to support magnet schools under the program, school districts must be carrying out a court-ordered or voluntary desegregation plan and must provide assurances of nondiscrimination, which OCR has the authority to evaluate.[133] Yet OCR has failed to use its authority to request information from school districts on civil rights compliance beyond the information previously submitted by the districts themselves, thereby neglecting a "legitimate tool for encouraging voluntary compliance with civil rights laws."[134] Moreover, a 1988 review of OCR pre-grant reviews, under the magnet program by the NAACP Legal Defense Fund suggested that OCR had cleared the Pittsburgh district to receive magnet funds despite an OCR regional office's own finding that Pittsburgh had discriminated in faculty assignments.[135] The same review indicated that OCR had improperly used an "intent" standard in clearing districts to receive magnet funds, despite the fact that the courts and OCR have previously recognized that practices which have a discriminatory effect may violate Title VI and justify OCR remedial action.[136] OCR officials had indicated that another review of Pittsburgh would take place, and that OCR was developing a policy to implement use of an "effects test" for magnet program clearance purposes, but no action had been taken as of early October, 1988.[137]

It is accordingly *recommended* that OCR return to the methodology used prior to 1984 in its vocational and civil rights surveys, and determine whether a comprehensive national resurvey is needed for 1990. In conjunction with improving the complaint investigation process, OCR should also seek to develop methods to increase the number and role of compliance reviews as part of the OCR enforcement process. Selection of compliance review sites should be based on qualitative criteria such as OCR survey data rather than random selection. OCR should also remove restrictions on conducting compliance reviews of districts which are subject to court or OCR-approved desegregation plans, or have requested technical assistance from OCR, and should study other ways to help prevent potential conflicts between OCR's enforcement and technical assistance functions. OCR should also develop policies to use its authority under the federal magnet school assistance program to gather and evaluate data effectively to determine compliance with civil rights laws, including establishment of a policy to utilize an "effects test" in clearing districts to receive magnet funds. Compliance reviews should generally be systemwide rather than focusing on particular isolated programs.

3. Obtaining relief for civil rights violations

Perhaps the most persistent criticism of OCR, particularly since 1981, has been its failure to obtain effective remedies, even in cases where OCR has made findings of discrimination. Although OCR found two thousand violations of law as a result of compliance reviews or complaints from 1981 to mid-1983, it began only twenty-seven administrative proceedings which can lead to fund cutoff or deferral and referred only twenty-four additional cases to the Division for prosecution.[138] Relief was slow or non-existent even in a number of these fifty-one cases due to delays by OCR or the Division.[139] In many other cases, OCR has not even reached the stage where findings are issued, but has instead resolved complaints without findings by accepting virtually "any agreement which results in a withdrawn complaint, regardless of the substance of the agreement," a practice which the Division and OCR staff have severely criticized.[140] Even in cases where findings have been issued, OCR has accepted numerous settlements since 1981 which rely on general promises or assurances and otherwise, simply fail to correct violations of law.[141]

For example, in 1976, OCR had found that the New York City schools had violated Title VI by discriminating in the hiring and assignment of minority teachers. A 1977 settlement agreement provided that New York would be ineligible to receive federal funds until it adequately remedied the violations, and federal money was accordingly withheld until 1982. In 1982, however, OCR agreed to a new settlement with New York which effectively allows the city to maintain virtually all-white faculties in many schools, to continue to assign less qualified personnel to predominantly minority schools, and to take no steps to remedy discrimination in promoting women to positions as principals and assistant principals.[142]

Another example is Peoria, Illinois, where, in 1984 OCR found that a number of schools were racially isolated in violation of Title VI. As OCR staff negotiated a possible settlement with Peoria, it was operating under guidelines that the consent decree in the *Bakersfield* case should provide the basis for settlements in cases like Peoria. As discussed above, there are serious deficiences in the remedy in *Bakersfield*. In Peoria, however, the director of OCR rejected the recommendations of his own Policy and Enforcement Service and accepted a settlement which was even weaker than in *Bakersfield*, since it did not encourage voluntary integrative transfers or include substantial compensatory education programs for racially isolated schools.[143] As the former director of OCR's Policy and Enforcement Service concluded, the settlement was "certainly not" adequate to address violations of Title VI.[144]

Several specific problems appear to be contributing to inadequate OCR enforcement. OCR has adopted a practice of issuing letters of findings to districts indicating that their civil rights violations have been corrected based only on assurances of future performance and without on-site monitoring, a process that has been severely criticized.[145] In addition, OCR has disbanded its national Quality Assurance Staff which, prior to its elimination, had found numerous errors and problems in OCR enforcement practices.[146]

It is accordingly *recommended* that OCR develop and implement guidelines for its enforcement and settlement practices. These guidelines should focus on determining which type of enforcement should be used in particular cases, avoiding delays when cases are referred to the Division, ensuring that settlements in cases where violations are found actually correct violations, prohibiting reliance on assurances of good faith or future actions in settlements without monitoring to ensure actual performance, and ensuring that resolution of cases prior to the issuance of findings are in accord with applicable laws and regulations. OCR should abolish the use of "violation corrected" Letters of Findings and return to its prior practice of issuing Letters of Findings with findings of fact and conclusions of law before negotiating corrective action. OCR should also return the quality assurance program to the national level to perform its previous functions of assessing the quality of OCR work, and assuring consistent implementation of policy.

4. Remedying in-school segregation

As more and more court decisions have required school districts to assign children of all races to each of their schools, attention has focused on ensuring that segregation does not occur within schools. Particularly in systems with a history of segregation, some schools have used testing and ability grouping to assign students to racially isolated classrooms and perpetuate segregation.[147] The problem is particularly serious because of persistent evidence that tests used by many school districts are biased against minorities.[148]

Although in-school segregation is within OCR's jurisdiction, OCR's response to the problem has been inadequate. Some information on in-school segregation is available via the civil rights survey, but the survey questions on the subject have not been updated since the 1970s and may miss serious problems. Despite findings of racially identifiable classrooms in a number of cases, moreover, OCR has accepted vague assurances that efforts would be made to avoid discrimination or has indicated that it will continue to monitor the situation.[149] In one case involving Dillon County, South Carolina, OCR had made three findings that ability grouping was being used to perpetuate segregation, but took no action until the 1983 *Adams* order led to a referral of the case to the Division. When the Division declined the case, OCR delayed any enforcement action for another two years until prodded by a House Subcommittee.[150] One former OCR official reported in 1985 that OCR considered dropping ability grouping cases altogether.[151]

It is accordingly *recommended* that OCR focus attention on the issue of in-school segregation, particularly in formerly segregated school districts. OCR should consider sponsoring general research into particular types of tests used by multiple school districts to assign students to classes as to which concerns have been raised of discrimination against minorities, which can be used to help identify and take action with respect to districts with problems of in-school segregation.

5. Enforcing prohibitions against sex discrimination

Sex discrimination in elementary and secondary education is a continuing and serious problem. While sex equity problems may not be as visible as problems of racial discrimination, since public schools are generally not segregated by sex, there is nonetheless a striking disparity in the opportunities and achievement of boys and girls throughout elementary and secondary education. Boys and girls participate unequally in sports, they score differently on the pre-college aptitude tests, they choose very different college and vocational education concentrations, and they are even treated differently in the classroom.

In 1982, only 35 percent of the more than 5.1 million high school athletes were girls.[152] This figure remained unchanged in 1985-86. One of the primary reasons for this disparity is that opportunities for girls are limited; for example, there are 25,000 less high school sports teams nationwide for girls than for boys.153 Boys and girls continue to express very different preferences for majors in college; 10.6 percent of high school girls want to major in the physical sciences, while 34 percent of high school boys choose them.[154] Although boys outscore girls on the SAT, the Education Testing Service (the producer of the SAT) has admitted that the SAT underpredicts the grades of college women.[155] In 1986, girls' scores were, on the average, sixty-one points below boys' scores.[156] Such discrepancies seriously damage opportunities for female high school students to go to college and obtain merit scholarships.[157]

In high school vocational education, women are 13 percent of engineering students, but 90 percent of the allied health professions.[158] One of the few areas in which girls outperform boys is in the high school drop-out rate, where the rate is slightly higher for boys;[159] but males who do not graduate from high school have a much higher employment rate than females who do not graduate.[160] Boys are more likely than girls to be suspended from school, but they also receive more teacher attention than girls.[161] The evidence suggests that such discrepancies are not caused by differences in abilities or preferences between boys and girls, but instead are attributable primarily to such problems as biased testing, differences in opportunities and resources, and improper channeling by educational authorities.[162]

Similar discrepancies exist with respect to school administrators and teachers. Although 84 percent of elementary school teachers are female, only 52 percent of high school teachers, 26 percent of elementary school principals, and 6 percent of high school principals are female. Women constitute only 7 percent of all school superintendants, although 70 percent of all teachers are female.[163]

Despite the serious nature of sex equity problems, federal financial support and enforcement efforts over the past seven years have declined dramatically. Indeed, "funding and support for equity-related issues have nearly disappeared at the federal and state levels. Equity is not merely out of fashion in the Department of Education--it has been declared an enemy."[164]

The primary vehicle for federal enforcement of sex equity in education is Title IX of the Education Amendments of 1972, which prohibits all aspects of sex discrimination in education that receive federal assistance.[165] The prohibition has been interpreted broadly to apply to admissions, athletics, employment, vocational education, child care, and financial aid.[166] As discussed earlier, for financial aid distributed by the Department of Education, it is the responsibility of OCR, in conjunction with the Department of Justice, to enforce federal laws such as Title IX. The federal government's investigation and resolution of sex discrimination complaints, however, has experienced a profound decline since January 1981.[167] During the first six years of the Reagan presidency, "[t]he word [went] out, very clearly, that the Office for Civil Rights finds aggressive enforcement of [Title IX] to be unacceptable."[168] The Justice Department's record appears, if anything, to be worse.[169] Nor has the Department of Education adequately supported programs to combat sex discrimination.

The same problems that have affected enforcement of other civil rights laws have also affected enforcement of Title IX. Initially, OCR has not developed policies that promote sex equity, and the effectiveness of its compliance-related activities has declined dramatically over the past seven years. For example, OCR has provided inadequate guidance to regional offices on how to process sex equity cases. A 1984 internal OCR report expressed concern that the regional offices had insufficient guidelines on how to conduct complaint investigations or compliance reviews in interscholastic cases at the elementary and secondary school level.[170] But the Assistant Secretary of Civil Rights was unable to recall whether OCR had taken any corrective actions as a result of this report.[171]

Administrative enforcement actions have also been lax. In the past, after OCR investigated a district and found a Title IX violation, it issued a letter of finding setting out in detail the violations. However, OCR policy has been not to issue the letter, but instead to find the schools in compliance, and then agree with the district on future compliance actions.[172] Not only is it difficult for the community to monitor these "agreements," but also school districts learn that Title IX violations are not likely to be punished. To make matters worse, OCR compliance reviews and monitoring are "spotty."[173] OCR has even pressured complainants to drop the complaints they have filed with OCR.[174]

In addition to OCR's lackadaisical enforcement efforts, another serious setback to enforcement of Title IX was the Supreme Court's decision in *Grove City v. Bell*.[175] Prior to *Grove City*, if an educational institution received money from the federal government, it could not discriminate.[176] In *Grove City*, however, the Supreme Court limited the coverage of Title IX (and the prohibition against sex discrimination) to only the specific program or activity which received federal funds.[177] The Department of Education ultimately interpreted *Grove City* rigidly, narrowing the coverage of Title IX. "Immediately after the *Grove City* decision, [OCR], by its own count, closed, limited, or suspended sixty-three claims because of the lack of direct federal funding. That was just the beginning."[178]

Initially, OCR had interpreted *Grove City* somewhat narrowly so as to preserve broad OCR jurisdiction with respect to elementary and secondary education. In a July, 1984 analysis of *Grove City*, the Assistant Secretary for Civil Rights stated that as to those school districts that receive Chapter 2 funds, "there is a presumption that all of [the district's] programs and activities are subject to OCR's jurisdiction" because the possible uses of Chapter 2 funds are so broad.[179] Such an interpretation would have permitted OCR to retain broad authority with respect to many districts with sex discrimination problems. But the Department's Reviewing Authority soon significantly narrowed this interpretation. In 1985, the Reviewing Authority dismissed an enforcement proceeding against a school district that maintained sex-segregated physical education classes, finding that the Department had no authority to apply Title IX, because no federal funds were specifically earmarked for the physical education program, even though other federal funds received by the district could have been used for the physical education classes.[180] This interpretation effectively confined OCR jurisdiction to cases where federal money could be traced directly to programs that discriminated, severely limiting enforcement efforts.

Another serious effect of *Grove City* was to discourage girls and women from filing complaints with OCR. Reports indicate that many women were afraid to file a complaint, viewing the risk to their education or jobs as too great if, after they had filed a complaint, OCR found that their specific program received no federal funds, and then dismissed their complaint.[181]

There has also been a decline in Department and overall federal support for programs to increase sex equity on a voluntary basis since 1981. In 1974, Congress passed the Women's Educational Equity Act (WEEA), 20 U.S.C. § 3341 *et seq.*, which established a program of grants and other support for projects to promote sex equity in education. Since 1981, however, the Executive Branch has sought to eliminate the program, and funding has been cut from $10 million in 1980 to $3.3 million in 1988. Although WEEA was intended to help develop and distribute model programs to address sex equity problems, Department of Education policies have resulted in no new model programs being published between May, 1984 and May, 1987.[182] Congress has sought to improve sex equity problems in vocational education through the Carl D. Perkins Vocational Education Act of 1984, 20 U.S.C. § 230 *et seq.*, which requires 12 percent of each basic state grant in support of vocational education to be earmarked for female students and set up a sex equity coordinator to monitor programs for female students. It is clear that serious problems of sex discrimination remain, however, that must be effectively combated as the nation moves into the 1990s.

While the passage of the Civil Rights Restoration Act should prevent the Department of Education from refusing to handle cases based on lack of jurisdiction under Title IX, the past eight years have seriously damaged efforts towards sex equity in education. The recommendations for improved federal enforcement in this area echo those discussed previously pertaining to the prohibitions against race discrimination. Accordingly, it is *recommended* that OCR once again aggressively enforce complaints of sex discrimination filed with it, and develop uniform guidelines to be sent to each regional office concerning the processing of different types of complaints of sex discrimination. OCR should also establish a more comprehensive monitoring procedure to ensure that school districts which have violated Title IX in the past have actually corrected their procedures so that they are in compliance with Title IX at the time of any settlement agreement, and so that they remain in compliance thereafter.[183] As part of what should become a comprehensive monitoring system, OCR should require that districts collect and maintain information on the nature and extent of sex equity activities, and OCR should analyze which activities prove most successful. It is also recommended that OCR resume its practice of broad audits of educational institutions suspected of discriminating.[184] This should include analyses of tests which appear to severely impede academic opportunities for female students. The Department should actively promote the development and dissemination of model sex equity programs, such as programs to improve voluntary compliance with Title IX, and increased funding should be provided for the Women's Education Equity Act and other initiatives to combat sex discrimination in education.

6. *Ensuring equal educational opportunity for language-minority students*

In 1968, the federal government first addressed the distinctive educational needs of language-minority students by enacting the Bilingual Education Act as Title VII of the Elementary and Secondary Education Act. During the next dozen years, the federal courts, the Congress, and four presidents pushed forward together along two parallel tracks to ensure that language-minority students receive effective and equal educational opportunities. The first track, represented by the Bilingual Education Act, involved the provision of federal aid and technical assistance to help schools develop effective instructional programs for non-English-language background students. The second track involved the enforcement of civil rights prohibitions against national-origin discrimination and the enactment of an equal educational opportunity law that requires schools to act affirmatively to overcome the language barriers confronting limited-English-proficient (LEP) students.

Since 1981, however, federal efforts to improve the education of language-minority students have slackened dangerously. In addition to seeking reduced appropriations for federal bilingual education programs, there have been repeated efforts to restrict student program eligibility and to eliminate the key feature of these programs--the provision of instruction through both English and the student's native language. At the same time, the Department has failed to discharge its responsibilities to protect the civil rights of national origin minority students who are limited in their English language proficiency. As our nation moves towards the 1990s, these serious problems must be addressed effectively.

a. Estimating the number of language-minority and limited-English-proficient students

According to the 1980 census, approximately 4.5 million school-age children lived in U.S. homes where a language other than English was spoken, classifying them as language-minority children. According to estimates, this number grew to nearly eight million by 1985.[185]

In 1982, Secretary of Education, T. H. Bell, reported that as of 1978 there were approximately 3.6 million school-aged language-minority children who were limited in the English-language skills needed to succeed in an English-medium school. Three-quarters of these limited-English-proficient children were born in the United States, or one of its outlying areas, and approximately 70 percent of the LEP students in 1978 spoke Spanish. The secretary also reported that there were 24,000 Navajo children with limited English proficiency aged 5 to 14 in 1980.[186]

> The number of language-minority children in the United States is projected to increase by nearly 40 percent by the year 2000, and Spanish language background children by over 50 percent. These percentages contrast with the projected increase in the number of school-age children in the general population which is about 16 percent.
>
> The number of LEP children in the United States is projected to increase by about 35 percent by the year 2000. Ninety-two percent of the projected increase will have Spanish language backgrounds.[187]

More recent Department of Education estimates of the LEP student population have been the subject of controversy. In 1986, Secretary of Education, William J. Bennett, released a report which slashed LEP student population estimates by almost two-thirds. The new estimates reported a total 1982 LEP student population of 1.2 to 1.7 million.[188]

Members of Congress challenged the accuracy of the Department's 1986 LEP student estimates, noting that most states had reported continuing growth of the language-minority and LEP student populations since the late 1970s. The state with the largest language-minority population, California, reported that its LEP student population had more than doubled between 1977 and 1986, rising from 233,444 to 567,564 students. Experts on the LEP student population noted that the Department's new estimates were based on dramatically reduced standards of English proficiency, and that the Department had used an arbitrary system of "indicators" to exclude otherwise LEP students from the estimate.[189]

The current lack of accurate counts and estimates for U.S. language-minority and LEP student populations is, in itself, a matter of national concern. The absence of reliable population data enfeebles federal policy-making, technical assistance, program administration, and civil rights enforcement on behalf of this growing segment of the American student population.

Accordingly, it is *recommended* that the Department of Education take steps to improve federal counts, estimates, and projections of the language-minority and LEP student populations. The Department should avail itself of all pertinent federal data as well as statistics gathered by state and local agencies. In analyzing these data, the Department should utilize the services of individuals with professional expertise in the demography of American language-minority populations.

b. The educational plight of language-minority students

For language-minority students, the impediments to academic success are several and severe. A disproportionate number of language-minority and LEP students are poor.[190] Hispanics in general are twice as likely as white Americans to be poor,[191] and more than half of all Puerto Rican children living in the United States in 1984 lived in poverty.[192] The parents of language-minority students are usually limited in their own English proficiency, and have significantly less educational preparation than the general population. According to the 1980 census, while more than half of all blacks and more than 70 percent of all whites age 25 and over had completed high school, of Hispanics 25 years of age and over, only 45 percent had completed high school.[193] Poverty is only part of the problem. Many language-minority children and even more of their parents have suffered discrimination at the hand of private parties and the government. In education, as well as other areas of social life, Indian, Hispanic, Asian and other nonwhite Americans have frequently been denied the opportunities available to whites. While the nation has moved closer to the goal of a color-blind society, we have yet to eliminate racial and ethnic discrimination or to overcome its lasting effects.

But in addition to these barriers to educational success, LEP students face additional challenges. First, they must learn English, a language other than their mother tongue. At the same time, LEP students must advance in their development of academic and social skills. And finally, many LEP students must learn to appreciate and accommodate a culture different from their own. For those LEP students who are newcomers to this country, "culture-shock" is often compounded by the traumas of war, famine, and disaster--forces that drive many families from their native lands.

Despite their acute educational needs, LEP students are not well-served by our schools. In 1982, Education Secretary Bell concluded that "although local school districts and states are making an effort, schools in general are not meeting the needs of LEP students."[194] The secretary reported that "many schools are not assessing the special needs of language-minority children. They are not assessing the English language proficiency of these children, much less the home language proficiency, as a basis for planning programs and providing services." And of the students identified as LEP, only one-third were receiving either bilingual instruction or instruction in English as a second language, without the use of their home languages.[195]

The most recent national empirical study of the educational condition of language-minority students was published in 1985 by the Educational Testing Service (ETS).[196] The ETS study was carried out as part of the National Assessment of Educational Progress, the federal government's primary program for measuring the educational performance of our schools and children. Under the NAEP program, a representative sample of more than one million students in the fourth, eighth, and eleventh grades are tested annually to determine their academic achievement. Under NAEP procedures, however, school officials were allowed to exclude students they judged unable to participate in the assessment because of disabilities (physical, mental, or behavioral disorder) or because their ability to speak English was *extremely* limited.

Of the four primary racial/ethnic groups identified in the NAEP survey (white, black, Hispanic, and other), students classified as Hispanic and "other" were most likely to be excluded from the NAEP assessment, and in more than 80 percent of the cases because of limited English proficiency. Thus, while "other" students constituted only 2 percent of all surveyed fourth graders, they constituted 10 percent of the fourth graders excluded from assessment. And 6 percent of all fourth grade Hispanic students in the sample and 5 percent of Hispanic eighth and 11th graders were excluded from assessment because of severe limitations in English proficiency.[197]

Of the assessed students, language-minority students (defined narrowly as children who come from homes where "most" people speak a language other than English) constituted 9 percent of the fourth grade, 7 percent of the eighth grade, and 6 percent of the eleventh grade NAEP sample. Despite the narrowness of the definition, more than 42 percent of the Hispanic students and more than one-third of the Asian and American Indian students assessed at all three grade levels were identified as language-minority.

NAEP reading test scores showed that "language-minority students, especially Hispanic children, are [performing] considerably below the national average, and that discrepancy increases with grade level and demands for performance on higher level reading tasks. Indeed, language-minority Hispanic students in the eleventh grade are performing at a level comparable to the national sample at grade eight."[198]

Reading test scores for the children assessed under NAEP were used to group students according to five levels of reading proficiency: Rudimentary, Basic, Intermediate, Adept, and Advanced. While 96 percent of all NAEP-assessed fourth graders had achieved at least a rudimentary level of reading proficiency, only 88 percent of the Hispanic language-minority fourth graders had done so. By the eighth grade,63 percent of all NAEP-assessed students and 70 percent of the white students had achieved intermediate reading proficiency, however, only 47 percent of the language-minority and just 37 percent of the Hispanic language-minority eighth graders reached the level of intermediate proficiency. At the eleventh grade level, 90 percent of the white students had achieved intermediate proficiency, and almost half (47 percent) were rated adept. By comparison, only 65 percent of Hispanic language minority 11th graders achieved "intermediate" proficiency and only 14 percent were classified as "adept" readers.[199]

The ETS study included another index of academic progress, the promotion of students from grade to grade, by measuring student age-in-grade. The study noted that "grade repetition, as indicated by over-agedness in grade, has long been recognized as a problem for Hispanic students in general, and for Hispanic language-minority students in particular. It has been associated in previous studies with the dropout rate of Hispanic youth."[200] The ETS study found that 2 percent of all white and 3 percent of all non-language-minority fourth graders were two or more years over-age (11 or older); 8 percent of the Hispanic language-minority fourth graders, however, were more than two years over-age. The picture worsens at the eighth grade level where 12 percent of Hispanic language-minority students are two or more years over-age (15 or older) compared with 3 percent of all white eighth graders.[201]

Despite lagging reading and academic performance, more than two-thirds of all the language-minority students assessed in the 1983-84 NAEP study, both Hispanic and non-Hispanic, were receiving neither bilingual nor ESL services.[202] At the same time, the study found that Hispanic language-minority youngsters were the most segregated group of students, with two-thirds to three-quarters of these children attending predominantly minority schools.[203]

The ETS report concluded:

> The gap in reading performance of language-minority students compared with their white non-language-minority classmates suggests that the unique educational needs of pupils whose home language is not English are currently not being served sufficiently by the American educational system.[204]

As grim as they are, the ETS-NAEP findings understate the extent of our failure to provide equal and effective educational opportunities to language-minority students. The most flagrant evidence of this failure--student drop-out rates of nearly 50 percent for Hispanic and Indian language-minority students--is not even addressed by the NAEP, since NAEP only addresses the performance of students still enrolled in school.

c. Background of federal bilingual education programs prior to 1981

On January 2, 1968, President Lyndon B. Johnson signed into law the Bilingual Education Act, successfully concluding a year of intense congressional activity focused on the educational needs of language-minority students, including all children of "limited English-speaking ability."[205]

The factors contributing to the federal decision to authorize funds specifically for the education of language-minority children were described by one scholar of federal education policy as follows:

> One factor influencing the federal view was the arrival of hundreds of thousands of Cuban refugees following the Castro revolution in Cuba. These refugees brought the issue of bilingual-bicultural education to the forefront since they had no intention of giving up their native culture or language. Another factor was the growing realization by educators of the special needs of the large numbers of limited and non-English speaking children in the public schools such as the Puerto Ricans in New York and the Mexican Americans in the Southwest. Still another factor was the civil rights movement of the 1960s which raised the concept of equal- educational opportunity in a way that began to inspire first questions and later demands from Spanish-surnamed and Indian American minorities. Finally, as the federal government accepted a responsibility to help disadvantaged children bridge the awareness gap caused by poverty backgrounds, it became apparent that linguistic gaps could no longer be ignored either.[206]

Senator Yarborough's explanation of the final bill was direct:

> The concept of the bill is really very simple--so simple that it is amazing that in all of our years of striving for improved education the problem has never been given much attention. The problem is that many of our school-age children in this nation come from homes where the mother tongue is not English. As a result, these children enter schools not speaking English and not able to understand the instruction that is all conducted in English.[207]

The Bilingual Education Action (BEA) established a voluntary, competitive grant program to "provide financial assistance to local educational agencies to develop and carry out new and imaginative elementary and secondary school programs" designed to meet the special educational needs of children of "limited English-speaking ability." Schools serving high concentrations of children from families with incomes below $3,000 per year or receiving payments under a program of aid to families with dependent children were eligible to apply for grants.

Under the BEA, grant funds could be used for pre-service and in-service training and for the establishment and operation of special instructional programs for language-minority students. Activities specified in the law as eligible for support included:

(1) bilingual education programs;

(2) programs designed to impart to students a knowledge of the history and culture associated with their languages;

(3) efforts to establish closer cooperation between the school and the home;

(4) early childhood educational programs related to the purposes of this title and designed to improve the potential for profitable learning activities by children;

(5) adult education programs related to the purposes of this title, particularly for parents of children participating in bilingual programs;

(6) programs designed for dropouts or potential dropouts having need of bilingual programs;

[and]

(7) programs conducted by accredited trade, vocational, or technical schools.[208]

The primary restriction on BEA grants was that they were required to be used by school districts to supplement, and in no case supplant, Title I-funded services to limited-English-speaking students.

Funding for the Bilingual Education Act was authorized for three years in progressively larger amounts: $15 million for fiscal year 1968; $30 million for 1969; and $40 million for 1970. Actual appropriations, however, fell far short of authorization limits. In fiscal year 1968, no funds were appropriated. In fiscal year 1969, $7 million in appropriations supported 76 project grants serving approximately 26,000 pupils. In fiscal year 1970, appropriations of $21.3 million supported more than 130 projects serving approximately 52,000 students.

The Education Amendments of 1969 extended the authorization of the Bilingual Education Act for two years, through fiscal year 1973, at increasingly higher appropriations limits. The 1969 Amendments also authorized the commissioner to make payments to the Secretary of the Interior for BEA programs in Indian reservation schools. Appropriations for the BEA rose from $25 million in fiscal year 1971 to $35 million in 1972, and to $45 million in 1973. At the same time, Congress authorized the expenditure of funds under a variety of existing and new federal education programs for bilingual-bicultural activities.

In 1974, Congress rewrote the Bilingual Education Act and reauthorized the Act through fiscal year 1978. The revisions, part of the Education Amendments of 1974, expanded the federal government's involvement in bilingual education in a number of ways. The 1974 Amendments also clarified the meaning of the Act's key term--"limited English speaking ability"--and clarified the kinds of programs eligible for Title VII assistance. In place of the broad and nondescriptive phrase "new and imaginative elementary and secondary school programs" set out in the original Act, the Amendments used the term "program of bilingual education" and defined it as:

> . . . a program of instruction, designed for children of limited English-speaking ability in elementary and secondary schools, in which, with respect to the years of study to which such program is applicable--(i) there is instruction given in and study of English and to the extent necessary to allow a child to progress effectively through the educational system the native language of the children of limited English-speaking ability, and such instruction is given with appreciation for the cultural heritage of such children, and, with respect to elementary school instruction, such instruction shall, to the extent necessary, be in all courses or subjects of study which will allow a child to progress effectively through the educational system.

While the 1974 Amendments loosened the family poverty requirements set out in the original Act, they added a new requirement that grant applications be developed in consultation with parents, teachers, and secondary students, and that successful applicants provide for continuing participation in the program of a parent committee.

The Amendments also included provisions to prevent the segregation of students in BEA programs. Title VII grantees were to make provision for the participation of children of limited English-speaking ability in regular classes for the study of art, music, and physical education. And grantees were authorized to provide for the voluntary enrollment of a limited number of English-language-background students "in order that they may acquire an understanding of the cultural heritage of the children of limited English-speaking ability. . . ." This authorization for the voluntary enrollment of English-language-background students was limited, however, by a statutory caution: "In no event shall the program be designed for the purpose of teaching a foreign language to English-speaking children."

To carry out the expanded BEA, Congress increased the fiscal year 1974 authorization level to slightly more than $141 million and provided for annual increases reaching $170 million in fiscal year 1978. Appropriations to carry out the restructured Bilingual Education Act increased steadily and substantially, rising from $68 million in fiscal year 1974 to $146 million in 1978.

The House Report on the Education Amendments of 1978, the next legislation revising and reauthorizing the Bilingual Education Act, provided the following capsule overview of the operation of the program nine years after its enactment:

> Fiscal year 1977 appropriations for the Act totaled $115 million. Seventy five percent of these funds were spent for grants for basic demonstration programs to over 425 local educational agencies in 47 states and outlying areas. Just over 60 percent of the funds are expended on Spanish-language programs with the remainder being spent on multi-lingual programs . . . involving one of 67 other languages.
>
> The remainder of funds under the Act are used for a variety of support services, including grants to institutions of higher education to develop and improve teacher training programs, graduate fellowships to prepare trainers of teachers, grants to states for technical assistance, and funds for a Title VII network consisting of 15 resource centers, 14 materials development centers, three dissemination and assessment centers and a national clearinghouse. Under the program, 100 institutions of higher education are offering teacher training to an estimated 25,000 personnel. At the graduate level, the fellowship program offers advanced degrees in 42 institutions reaching about 500 candidates.
>
> About 57 percent of the basic local educational agency grants reach urban areas, 36 percent reach towns and suburban areas, and about 6 percent reach rural areas. The majority of the programs are concentrated in California, Texas, and New York. Nine states did not operate any Title VII programs in fiscal year 1977.[209]

Like the 1974 Amendments, the 1978 Amendments to the Bilingual Education Act refined key terms in the law. The new legislation used the term "limited English proficiency" rather than "limited English-speaking ability" and provided a more functional educational definition: individuals who "have sufficient difficulty speaking, reading, writing, or understanding the English language to deny such individuals the opportunity to learn successfully in classrooms where the language of instruction is English." Thus, for the first time, the Bilingual Education Act referred to the specific language skills involved in learning. The new definition of "limited English proficiency" also included language to highlight the eligibility of American Indian and Alaskan Native students.

In keeping with Congress's continuing concerns about school segregation, the 1978 Amendments clarified that up to 40 percent of the students enrolled in Title VII Programs could be English-language-background children. While the 1978 Amendments required that such integrated programs be principally focused on helping LEP children improve their English language skills, the Amendments eliminated the prohibitory reference to foreign language teaching set out in the 1974 Act.

The 1978 legislation anticipated significant future growth in the Title VII program. The Amendments provided a $200 million authorization level for fiscal year 1978, with a $50 million annual increase in authorization levels through 1983. Finally, the 1978 Amendments directed the secretary of HEW to submit, not later than 1981, a report to the president and the Congress "setting forth recommendations on the methods of converting, not later than July 1,1984, the bilingual education program from a discretionary grant program to a formula grant program."

The expansionary vision of bilingual education set out in the 1978 Amendments was not matched by money. While fiscal year 1978 appropriations increased by more than $30 million to $146 million, total Title VII funding in fiscal year 1980--the highest in the Act's history--was only $167 million, less than half of the authorization level.

d. Background of federal civil rights efforts on behalf of language-minority students prior to 1981

The federal government's first efforts to ensure equal educational opportunities for language-minority students grew out of the prohibition against "national origin" discrimination in federally-assisted programs and activities contained in the Title VI of the 1964 Civil Rights Act. In 1968, the Department of Health, Education, and Welfare (HEW) issued guidelines which held "school systems . . . responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system." Just over a year after President Nixon took office, the director of OCR followed up on the general 1968 guidelines with specific information on the civil rights responsibilities of schools serving language-minority students.

On May 25, 1970, the director of OCR sent a memorandum to school districts whose national-origin minority group enrollments exceeded five percent.[210] The memorandum noted "a number of common educational practices which have the effect of denying equality of educational opportunity to Spanish-surnamed pupils." "Similar practices," it continued, "which have the effect of discrimination on the basis of national origin exist in other locations with respect to disadvantaged pupils from other national origin-minority groups, for example, Chinese or Portuguese."

To "clarify HEW policy on issues concerning the responsibility of school districts to provide equal educational opportunity to national-origin minority-group children," the memorandum identified four basic school district responsibilities:

> (1) Where inability to speak and understand the English language excludes national-origin minority-group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.
>
> (2) School districts must not assign national-origin minority-group students to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills; nor may school districts deny national-origin minority-group children access to college preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills.
>
> (3) An ability grouping or tracking system employed by the school system to deal with the special language skill needs of national-origin minority-group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational dead-end or permanent track.
>
> (4) School districts have the responsibility to adequately notify national-origin minority-group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

The memorandum signaled the beginning of increased activity within OCR on behalf of language-minority students. Its full significance, however, would not be realized until the Supreme Court's 1974 decision in *Lau v. Nichols*.

Lau was a class-action suit brought on behalf of LEP students of Chinese ancestry enrolled in the San Francisco public school system. Of the 2,800 Chinese LEP students, about 1,000 received supplemental instruction in the English language; about 1,800, however, received no special instruction. The plaintiffs alleged that the school district's conduct violated both the Fourteenth Amendment of the Constitution and the Title VI of the Civil Rights Act of 1964, but they did not seek a specific remedy --only that the Board of Education be directed to apply its expertise to the problems and to rectify the situation.

Both the District Court and the Court of Appeals found no violation of the Chinese students' constitutional or statutory rights. The Court of Appeals concluded that the San Francisco school district's duty to non-English-speaking Chinese students "extends no further than to provide them with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district."[211]

In 1974, the United States Supreme Court unanimously overturned the lower court's decisions in *Lau*, finding that the school district had violated Title VII.[212] Because it found that plaintiffs' statutory civil rights had been violated, the Court did not consider their constitutional claims.

In delivering the Court's decision, Justice Douglas reviewed provisions of the California Education Code regarding English language and bilingual instruction in the State, high school graduation requirements pertaining to English proficiency, and the compulsory full-time education of children between the ages of six and 16 years. Justice Douglas reasoned that:

> Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.
>
> Basic English skills are the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.[213]

Justice Douglas then cited the general Title VI guidelines, promulgated by HEW in 1968, barring actions which are discriminatory in effect even though no purposeful design is present. "It seems obvious," he wrote, "that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program--all earmarks of the discrimination banned by the regulations."[214] The Court also cited the provisions regarding students' English language deficiencies set out in the 1970 OCR Memorandum, noting that school districts agreed to comply with these requirements as a condition for receiving federal aid.[215]

Even before *Lau*, OCR officials knew from previous compliance reviews that most schools were doing little or nothing to overcome the special barriers confronting language-minority students. Once the Supreme Court had ruled in *Lau*, OCR focused its attention on the question the Court did not answer--what kind of special instruction should schools provide to limited-English-proficient students. To develop answers to the question, HEW assembled a task force of experts on language-minority education and school administration.

In August 1975, the commissioner of education announced the issuance of HEW guidelines for compliance with Title VI under *Lau*. The guidelines, officially titled "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under *Lau v. Nichols*" are usually referred to as the "*Lau* Remedies" or "*Lau* Guidelines."

The *Lau* Guidelines were detailed and specific. They specified approved approaches, methods, and procedures for: identifying and evaluating national origin-minority students' English language skills; determining appropriate instructional treatments; deciding when LEP children were ready for English-medium mainstream classes; and identifying professional standards for teachers of language-minority children.

Significantly, the *Lau* Guidelines went beyond the *Lau* ruling to specify that schools should provide instruction to elementary students in their strongest language until they could participate effectively in English-only classrooms. English-as-a-Second Language (ESL) was prescribed for all students for whom English was not the strongest language. Finally, any school districts that wished to rely exclusively on ESL would be obligated to demonstrate that their programs were as effective as the bilingual programs described in the guidelines.

The *Lau* Guidelines were widely circulated in memorandum form to school officials and the public; they were not, however, published in the *Federal Register*. While the unpublished *Lau* Guidelines were concerned with remedying Title VI noncompliance, they quickly evolved into the *de facto* standards that OCR staff applied to measure school districts' compliance with Title VI under *Lau*.

Between 1975 and 1980, OCR carried out nearly six hundred Title VI *Lau* reviews, concentrating on districts with substantial language-minority student enrollments. These reviews led to the negotiation of voluntary compliance plans by 359 school districts during the five-year period. Virtually all of the voluntary compliance plans adhered to the standards set out in the *Lau* Guidelines.

In 1978, when an Alaskan school district filed suit contesting OCR's use of the *Lau* Guidelines for determining Title VI compliance, the Department of Health, Education, and Welfare agreed, in a consent decree, to publish at the earliest practical date formal Title VI *Lau* compliance guidelines.[216] Responsibility for fulfillment of the consent decree fell to the newly-formed Department of Education, which on August 5, 1980 published in the *Federal Register* a Notice of Proposed Rulemaking (NPRM). In general, the proposed rules required school districts receiving Federal assistance to provide special instruction to all limited-English-proficient national-origin minority-group students and, under most conditions, to provide some native-language instruction in academic subjects to LEP students who were more proficient in their native language than in English.

Possibly in response to prior criticism about ambiguities in the *Lau* Guidelines, the NPRM included numerous objective programmatic standards. The NRPM's standards encompassed such matters as the identification of language-minority students, the assessment of their language proficiencies, the provision of appropriate instructional services, and criteria for determining when students should "graduate" from special instructional programs.

The Education Department received over four thousand public comments on the NPRM, most of which objected to one or more of the NPRM's provisions. There were calls for congressional action to block *Lau* rulemaking by the Department. After a meeting with congressional leaders, Education Secretary Shirley Hufstedler voluntarily suspended finalization of the Title VI guidelines. Following the election of Ronald Reagan in November of 1980, Secretary Hufstedler instructed OCR staff to prepare a comprehensive analysis of the public comments received on the August NPRM. The analysis was intended to help the new administration grapple with what had proven to be an exceedingly complex and controversial set of educational, social, and legal issues.

Concerns about equality of educational opportunity for language-minority students also occupied the attention of Congress. One section of the 1974 Education Amendments, the Equal Educational Opportunities Act of 1974 (EEOA), defined as a denial of equal educational opportunity

> the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.[217]

The EEOA did not define "appropriate action" and its legislative history does not amplify Congress's intent. Despite this ambiguity, the EEOA has proven helpful in legal struggles to ensure equal educational opportunities for language-minority students.

Unlike Title VI, the EEOA applies to all public schools, not just those receiving federal aid. Further, because the EEO authorizes civil actions by aggrieved individuals as well as by the attorney general, the federal courts have held that the protections of the EEOA are available to students without regard to the issue of the number of unserved students.

Since the mid-1970s, the federal courts have increasingly been called upon to determine whether language-minority students were receiving equal educational opportunities under Title VI and the EEOA. In making these determinations, the courts have closely examined such matters as the identification and assessment of language-minority students, student grouping and assignment, curricular offerings and instructional programs, staffing, training, and school communications with parents. In most of the reported cases, the federal courts have found a violation of the LEP students' rights. Furthermore, all of the court-ordered plans to remedy Title VI and EEOA violations have made provision for some instructional use of the LEP student's native language.

e. Funding Federal bilingual education programs since 1981

Federal financial assistance under the Bilingual Education Act has fallen sharply during the last eight years. Fiscal year 1988 appropriations for Title VII were 12 percent below the 1980 level in nominal dollars. When adjustments are made for inflation, federal financial support for bilingual education programs fell by more than 47 percent between fiscal years 1980 and 1988.[218]

Reductions in the level of federal support for bilingual education programs would have been even deeper if Congress had approved the Reagan administration's budget requests. In keeping with the reduced authorization levels specified in the Omnibus Budget Reconciliation Act of 1981, Congress appropriated $134 million for Title VII in fiscal year 1982, $23 million less than the previous year. Despite this substantial reduction, the Reagan administration pushed for deeper cuts in Title VII funding. In fiscal year 1983, the administration proposed to reduce Title VII appropriations to $94.5 million. Congress declined to adopt the administration's proposal and level-funded Title VII at $134 million. The next year, the administration again asked Congress to slash Title VII appropriations, this time to $92 million. Congress responded by increasing fiscal year 1984 appropriations by slightly more than $1 million to $135.5 million. Since fiscal year 1984, the administration and Congress have basically followed a hold-the-line appropriations strategy.

While the number of students in need of bilingual education programs has increased sharply, the number of students actually served under Title VII has declined substantially. In fiscal year 1981, more than 269,000 students participated in Title VII programs. In 1986, fewer than 197,000 students were participating in Title VII programs.

The impact of the decline in Title VII funding will be felt for years to come. In addition to providing grants directly to school districts for instructional programs, Title VII supports a wide range of programs and activities designed to strengthen our schools' capacities for serving language-minority students. These capacity-building components of the Title VII program have been seriously weakened. For example,

> In fiscal year 1981, Title VII provided more than 4 million in fellowship aid to 529 students in engaged in graduate study pertaining to bilingual education. In fiscal year 1987, fellowship aid stood at $2.5 million supporting approximately 250 graduate students. Currently, the Department of Education does not intend to make any fellowship awards in fiscal year 1988.

> In FY 1981, $9.8 million was appropriated for nineteen multipurpose resource centers to help schools improve programs for language-minority students. In fiscal year 1986, sixteen centers were operating under a $6.8 million budget.

> In fiscal year 1986, $3.2 million was appropriated for research studies and evaluation. Not taking inflation into account, this was just about half the amount of funding available in fiscal year 1981.

> Title VII funding for the development of instructional materials fell from $6.5 million in fiscal year 1981 to $250,000 in 1987.

As a result of these and other Title VII reductions, the pace of educational improvement for language-minority students has slowed substantially. It is *recommended* that significant additional appropriations be sought for Bilingual Education Act programs. The Department's 1989-90 budget request should seek to restore such funding to fiscal year 1980-1981 levels adjusted for inflation. Subsequent budget requests should provide for sustained real growth in the federal bilingual education program.

f. Federal policy concerning native language instruction since 1981

On April 8, 1982, Education Secretary, T. H. Bell, sent to Congress draft legislation to amend the Bilingual Education Act. The primary change sought by the amendments was elimination of the requirement, explicit in the Act since 1974, that Title VII programs make some instructional use of a LEP student's native language.[219] In support of this radical change, Secretary Bell testified:

> The proposed language . . . reflects our belief that school districts are in the best position to evaluate the needs of their students and to design programs in response to those needs.
>
> While at present the Title VII legislation requires the use of both English and non-English languages, or proposed legislation would not; school districts would be free to propose programs which use both languages or which use English exclusively.[220]

The administration's Title VII amendments were considered in two days of subcommittee hearings in the Spring of 1982. Most of the public testimony and expert evidence presented during the hearings contradicted the administration's proposals, and no further action was taken on the legislation during the 97th Congress.

In 1984 Congress embarked on its third legislative reauthorization of the Bilingual Education Act. A bill making significant improvements in the BEA, H.R. 5231, was introduced and then considered in a subcommittee hearing in March, 1984.

H.R. 5231 clarified the goals of Title VII instructional programs by requiring that they "allow a child to achieve competence in the English language . . . [and] to meet grade-promotion and graduation standards." The bill also required that all Title VII programs provide "structured English language instruction" through an intensive ESL component.

In place of a single type of instructional program, H.R. 5231 identified six different types of programs eligible for Title VII support. Four of the programs focused on special purposes or populations.

> Programs of Academic Excellence "which have an established record of providing effective, academically excellent instruction and which are designed to serve as models of exemplary bilingual education programs and to facilitate the dissemination of effective bilingual education practices."
>
> Family English Literacy Programs "designed to help limited-English-proficient adults and out-of-school youth achieve competence in the English language." The legislation specified that preference for participation in these programs shall be accorded to "the parents and immediate family members of children enrolled in programs assisted under this title."
>
> Bilingual preschool, special education, and gifted and talented programs.
>
> Programs to develop instructional materials in languages for which such materials are commercially unavailable.

The two other programs identified in H.R. 5231 --Transitional Bilingual Education (TBE) and Developmental Bilingual Education (DBE)--were general-purpose instructional programs. The legislation stipulated that 75 percent of all appropriations for instructional grants be reserved for TBE programs, those most resembling the "basic" programs authorized under existing law.

H.R. 5231's most significant innovation was the new authorization of grants for Developmental Bilingual Education programs. The authorization was based on the finding

> that both limited-English-proficient children and children whose primary language is English can benefit from bilingual education programs, and that such programs help develop our national linguistic resources.

Unlike the other programs set out in H.R. 5231, DBE programs were meant to promote bilingual proficiency rather than merely English proficiency. To foster this educational objective and to promote racial and ethnic integration, the legislation stipulated that

> [w]here possible, classes in programs of developmental bilingual education shall be comprised of approximately equal numbers of students whose native language is English and limited English proficient students whose native language is the second language of instruction and study in the programs.

In its original form, H.R. 5231 did not authorize Title VII support for monolingual English-language instructional programs. Accordingly, the administration voiced opposition to the bill.

As a compromise, a seventh type of instructional program, Special Alternative Instructional Programs (SAIP), was authorized. Like TBE programs, Special Alternative Instructional Programs must be designed to help LEP students achieve proficiency in English and to meet grade-promotion and graduation standards. Unlike TBE programs, these programs need not make any instructional use of the LEP child's native language.

Authorization for the Special Alternative Instructional Programs was premised on a new legislative finding "that in some school districts establishment of bilingual education programs may be administratively impractical due to the presence of small numbers of students of a particular native language or because personnel who are qualified to provide bilingual instructional services are unavailable."

To prevent the administration from using the new monolingual program to divert resources from time-tested dual-language instructional programs, a formula was devised to control SAIP funding. Under the formula, four percent of the first $140 million of Title VII appropriations were reserved for SAIP. To encourage the administration to seek additional appropriations for the BEA, the formula also reserved 50 percent of all Title VII appropriations in excess of $140 million for SAIP grants, subject to a 10 percent limitation of total Title VII funding. On October 19, 1984, President Reagan signed the Education Amendments of 1984 as Public Law 98-511.

Before the Education Department had developed regulations to implement the 1984 amendments to the BEA, Education Secretary Bell resigned and President Reagan appointed William J. Bennett to be his successor. On September 26, 1985, in a speech to the Association for a Better New York, Secretary Bennett lashed out against federal bilingual education policy. Citing the high dropout rates of Hispanic students, Bennett termed the seventeen-year-old BEA a "failure." The Secretary declared:

> This, then, is where we stand: After seventeen years of federal involvement, and after $1.7 billion of federal funding, we have no evidence that the children whom we sought to help--that the children who deserve our help--have benefited.

He charged that federal bilingual education policy had "lost sight of the goal of learning English as the key to equal educational opportunity" and had promoted native-language instruction as "an emblem of cultural pride."

To "reform" federal bilingual education programs and policies, Bennett announced a three-part "initiative." First, the secretary promised that the Department would develop regulations to implement the 1984 amendments to the BEA which would give preference to programs that moved children as quickly as possible from native-language instruction to mainstream classes. Second, the secretary announced that the Department would notify all school districts which had adopted voluntary compliance plans based on the "*Lau* Guidelines" that they were free to renegotiate the plans with the Department's Office for Civil Rights. Finally, the secretary announced that the Department would push for the enactment of legislation removing all restrictions on Title VII funding for English-only instructional programs.

The following spring, the Senate Subcommittee on Education, Arts, and Humanities held a one-day hearing on S. 2256, which would have eliminated the 1984 formula applicable to TBE and SAIP funding. Most of the witnesses who testified on S. 2256 opposed the legislation, and the bill did not receive further consideration in the 99th Congress.

The Education Department did not seek substantial increases in the Title VII appropriations above the $140 million level to set in motion the 50 percent escalator provision contained in the compromise SAIP funding formula. Still, in fiscal year 1987, the Department was able to make 41 SAIP grants serving almost ten thousand LEP students under the 4 percent minimum set-aside provided in the 1984 Amendments.

Meanwhile, Secretary Bennett, and other top Department officials, continued to campaign for the removal of all Title VII funding limits on SAIP grants. They asserted that English-only instructional programs were as likely to meet the educational needs of LEP students as were programs which made some instructional use of the LEP child's native language.

Anticipating legislative action to reauthorize the BEA in 1987, House Education and Labor Committee Chairman Augustus F. Hawkins asked the General Accounting Office (GAO) to review the administration's assertions regarding native language instruction in the light of contemporary research evidence. The GAO selected ten experts, five of whom had been nominated by department officials, or whose work had been cited by department officials in support of the administration's proposed bilingual education policies, to carry out this review. In March of 1987, the GAO released its report entitled "Bilingual Education: A New Look at the Research Evidence."

The GAO report contradicted the Department's position on native-language instruction. Only two of the ten experts agreed with the administration's assertion that native-language instruction did not help LEP students become proficient in English. On the question of whether research evidence supported the use of native-language instruction to teach academic subjects other than English to LEP students, only three of the experts responded in the negative. Finally, seven of the ten GAO experts disagreed with the Education Department's assertions that monolingual-English instructional programs were as likely to meet the educational needs of LEP students as programs which offer some native-language instruction.

Despite the GAO's findings, the Department continued to push the administration's amendments as Congress worked on Title VII reauthorization legislation during 1987 and 1988. As in 1984, Congress struggled to achieve a bipartisan compromise to end the controversy.

The August F. Hawkins-Robert T. Stafford Elementary and Secondary Education Improvement Act of 1988, signed as Public Law 100-297 on April 28, 1988, reauthorized the BEA through fiscal year 1993. The Hawkins-Stafford Act set a $200 million authorization limit on Title VII for fiscal year 1989 while providing an unlimited authorization of appropriations for fiscal year 1990-1993.

The Hawkins-Stafford Act authorizes the secretary to reserve up to 25 percent of all program grant funds for SAIP. At the same time, the Act requires the secretary to reserve at least 75 percent of all grant funds for TBE programs.[221] With respect to grants for the other four types of Title VII instructional programs--Developmental Bilingual Education, Programs of Academic Excellence, Family English Literacy, and Programs for Special Populations--the Act provides they may be funded from either the 25 percent permissive set-aside for SAIP or the mandatory 75 percent reservation for TBE. Finally, the Act states that the new funding reservations shall not result in "changing the terms, conditions, and negotiated levels of any grant awarded in fiscal year 1987" for the life of the grant.

Senate Labor and Human Resources Committee Chairman, Edward M. Kennedy, the chief architect of the final compromise Title VII funding provisions, explained their intent:

> Inclusion of the Senate bill's new funding reservations in H.R. 5 accommodates the Education Department's quest for greater funding flexibility without mandating increased spending for monolingual instructional programs. This enhanced funding flexibility should be exercised in a responsible fashion, and I urge both the Department of Education and my colleagues on the Senate and House Appropriations Committees to allocate nonreserved funds to those part A programs, which, on the basis of objective program evaluation and research data, are shown to be most effective in helping limited-English-proficient students achieve academic success. In this regard, I am troubled by the fact that the Department of Education currently provides only two grants, amounting to less than one-quarter of 1 percent of all part A grant funds, for two-way developmental bilingual education programs. Locally funded two-way bilingual education programs have proven effective in meeting the second-language learning needs of both limited-English-proficient students and monolingual-English students in a positive, integrated educational environment. These include several two-way bilingual programs in my own state. . . . Programs like these deserve additional Federal support, support made possible under the bill's new funding reservations.[222]

The flexible Title VII funding provisions set out in the Hawkins-Stafford Act provide a mechanism for ending, once and for all, destructive debate over the allocation of scarce resources among necessary programs. This mechanism should be used, thoughtfully and creatively, in developing its budget proposals for Title VII. Specifically, it is *recommended* that the Department propose in its next budget request to provide *equal* funding for Developmental Bilingual Education and Special Alternative Instructional Program grants the two instructional program alternatives to Transitional Bilingual Education. Transitional Bilingual

Education programs have also proven successful in meeting the distinctive educational needs of LEP students. As provided under the Hawkins-Stafford Act, it is *recommended* that such programs receive continued strong federal support.

There are local situations which render bilingual education programs for LEP students impractical. In such situations, LEP students need and deserve the kind of instruction supported by Special Alternative Instructional Program grants. Developmental Bilingual Education Programs, however, are more than simply an alternative to Transitional Bilingual Education programs. In communities scattered across the nation, locally-funded two-way developmental bilingual education programs are helping students succeed academically while becoming proficient in two languages.[223] These programs promote ethnic integration, cross-cultural understanding, and respect for other human beings in ways that few other programs can. Their success, both academic and social, follows from their basic premise that a child's language represents a resource to be developed and shared, never a "problem" to be overcome. It is *recommended* that support for Developmental Bilingual Education programs should be treated as a top civil rights and education priority.

g. Federal civil rights efforts on behalf of language-minority students since 1981

As one of his first official acts, Education Secretary, T. H. Bell, announced on February 2, 1981 that the Department of Education was formally withdrawing the Carter administration's Notice of Proposed Rulemaking (NRPM) respecting the Title VI responsibilities of federally-assisted schools serving language-minority students. Characterizing the August 5, 1980 NPRM as "harsh, inflexible, burdensome, unworkable, and incredibly costly," Secretary Bell promised that the Department would "protect the rights of children who do not speak English well," but would do so by "permitting school districts to use any way [educational program] that has proven to be successful." The secretary provided no details about the Department's new approach to Title VI enforcement.

Soon thereafter, educational leaders expressed concern to Secretary Bell that his announcement could be misinterpreted by school officials as signaling the Department's loss of interest in civil rights enforcement. The secretary responded by sending a two paragraph memorandum to chief state school officers on March 30, 1981. "The fact that the *Lau* Regulations were withdrawn as the first in a series of actions that we hope to take in our program of deregulation should not be construed as an intent on our part to not carry out the responsibilities that we have to assist and encourage full compliance with the civil rights of children with limited-English-proficiency," Bell wrote. Noting that he was scheduled to meet with the chief state school officers in June, Secretary Bell's memorandum concluded:

> In the meantime, we would urge you to encourage local education agencies to be cognizant of the law and their responsibilities. As you know, many of the rigid requirements and rules emerge from a failure to take appropriate action to comply with requirements of law. As we work together, perhaps we can persuade our colleagues from this eventuality with respect to their obligations under *Lau v. Nichols*.

Secretary Bell appointed his Under Secretary, Bill Clohan, to lead the Department's efforts to develop a flexible, yet effective, Title VI policy to protect the rights of limited-English-proficient language-minority students. Clohan, in turn, asked OCR to prepare a discussion memorandum covering the basic issues associated with the Department's Title VI *Lau* enforcement policy.

In July 1981, Assistant Secretary for Civil Rights, Clarence Thomas, sent Clohan a comprehensive memorandum on Title VI *Lau* enforcement. The memorandum reviewed the history of federal policy regarding language-based discrimination, analyzed the problem of language discrimination and its regulatory implications, reviewed alternative *Lau* enforcement policies, and outlined OCR's proposed enforcement policies and investigative procedures.

The OCR memorandum to Clohan emphasized the distinctive nature of language discrimination.

> Despite these general similarities [to other forms of illegal discrimination, for example, race and sex], discrimination against language-minority students differs from other forms of illegal discrimination in a significant respect. An

> individual's race, sex, or religion are *educationally irrelevant* characteristics. An individual's language is an *educationally relevant* characteristic, however, because language is the vehicle through which the school communicates to students. Thus race, sex, and religious discrimination occur when school officials treat individuals *differently* because of an educationally-irrelevant characteristic. Language discrimination, on the other hand, occurs when school officials ignore an educationally-relevant individual characteristic --language, and treat non-English-speaking students in the *same manner* as they treat English-speaking students. This distinction was the crux of the Court's decision in *Lau*.
>
> Moreover, the remedy for language discrimination is fundamentally different than the remedy for race or sex discrimination. To cure these latter forms of discrimination, school officials must reform their policies and procedures to eliminate consideration of educationally-irrelevant student characteristics. In most cases, school officials do not need to establish new educational programs for minorities and women, but rather must insure that minorities and women have access to and participate in the educational programs they generally offer. To cure a *Lau* violation, school officials must adjust their policies and procedures to take into account an educationally-relevant student characteristic--the language skill needs of non-English-speaking students. In most cases, school officials need to establish a special educational program for language-minority students to remedy a *Lau* violation.

In OCR's view, the distinctive nature of language-based discrimination had two major consequences for federal civil rights enforcement policy. "First, the detection and elimination of language-based discrimination requires the federal government to examine a school district's substantive educational program to a degree that is usually not required in other civil rights areas." Second, there is a "seemingly unlimited number of relevant variables [pertaining to both students and school districts] which must be taken into account in determining whether a school district is providing equal educational opportunities to language-minority students." As a result of these consequences, OCR concluded that "an effective and reasonable *Lau* compliance policy cannot be reduced to a mechanistic compliance formula." Accordingly, Assistant Secretary Thomas argued that the Department should not attempt to develop detailed Title VI *Lau* compliance standards as the Carter administration had tried in the ill-fated NPRM. "The complexities associated with the provision of equal educational opportunities to limited-English-proficient national-origin minority- students," he wrote, "seem to preclude--both practically and politically--formulation of detailed substantive Title VII *Lau* compliance standards."

The OCR memorandum proposed that the Department adopt a "flexible 'facts and circumstances' approach for determining whether a school district has taken the appropriate steps to insure that language-minority students receive equal educational opportunities. "The memorandum stated:

> The compliance standard or test would be whether the steps taken by a school district are calculated to be effective and are reasonable in light of student needs and district resources. Unlike the withdrawn NPRM and the "*Lau* Remedies," this enforcement approach would not be premised on the assumption that any one instructional methodology or service is legally or educationally preferable. Because of this fact, the general *Lau* enforcement approach proposed herein would not unnecessarily interfere with the authority of local school districts to control their educational programs.

The disadvantage of OCR's proposed *Lau* enforcement approach, Thomas conceded,

> . . . is that it requires the exercise of considerable judgment and discretion. This disadvantage is an inevitable concomitant of the flexibility and nonprescriptiveness inherent in such an approach.

Nevertheless, with appropriate "OCR staff training, headquarters monitoring of *Lau* investigations and compliance reviews, and secretarial review of all proposed findings of noncompliance," Assistant Secretary Thomas argued, OCR's proposed *Lau* enforcement approach "could be implemented so as to fulfill the secretary's commitment to *reasonable* and *effective* civil rights enforcement."

Following receipt of the July 1981 OCR memorandum, the Department's General Counsel, Daniel Oliver, raised questions about the continuing validity of an "effects test" to identify discrimination under Title VI such as that approved in *Lau*. Oliver argued that the Department should not adopt a *Lau* enforcement policy barring unintentional discrimination. In support of his position, General Counsel Oliver cited post-*Lau* court decisions holding that discrimination must be intentional before it violates Title VI and dicta from Supreme Court decisions questioning the "continuing vitality of *Lau*."

Assistant Secretary Thomas countered the General Counsel's argument against following *Lau* by sending the Under Secretary a 26-page legal analysis OCR staff had prepared on the issue. In the cover memorandum, Thomas concluded that:

> the Department has the legal authority under Title VI to require federally assisted school districts to 'provide special instructional services to limited-English proficient national origin minority students . . . and that the General Counsel's contrary views are not well developed or legally supported.

Under Secretary Clohan agreed with OCR. "I do not believe we should in effect overrule the *Lau* case prior to the Supreme Court overruling it." Accordingly, the under secretary directed both offices to develop Title VI guidelines applicable to language-minority students. Although the White House soon requested and received Mr. Clohan's resignation, his decision to uphold *Lau* was not overturned by the secretary or his successor.

While Education Secretary Bell sought not to attract public and congressional attention to OCR policy-making and enforcement activities respecting language-minority students, his successor followed a different course. As discussed earlier, Secretary Bennett's high-profile 1985 New York speech on bilingual education attacked all aspects of federal bilingual education policy, including OCR activity. One of the three bilingual education "initiatives" Secretary Bennett announced in that speech was his invitation to local school districts to modify previously negotiated *Lau* compliance plans.

OCR implemented Secretary Bennett's "initiative" later in the year by sending individual letters to the nearly five hundred school districts which had previously agreed to implement OCR-approved plans to remedy Title VI violations respecting language-minority students. The letters stated:

> This letter is to remind you that OCR policy for the past several years has been to allow school officials the flexibility to choose any educational program that meets the educational needs of the language-minority students enrolled in their schools. In that regard, [addressee school district] has the option to modify any program previously negotiated as part of the compliance agreement noted above, or to change from one type of program to another, as long as the district continues to meet the requirements of Title VI and to provide for the effective participation of all language-minority students in the educational programs it offers.

OCR attached to the letter a copy of the May 25, 1970 OCR memorandum cited in *Lau* and a new, seven-page memorandum outlining "OCR's Title VI Language Minority Compliance Procedures." OCR asked to be informed of any intended changes in the district's *Lau* plan, and promised to notify the district within ninety days as to whether the modifications complied with Title VI requirements.

OCR's invitation drew little response; after five months, only fourteen schools had proposed modifications in the previously-approved *Lau* compliance plans.[224] The invitation did, however, attract the attention of the three Chairmen of House Subcommittees which share oversight responsibility for the Education Department's Office for Civil Rights. In a joint letter to Secretary Bennett, the three representatives requested comprehensive data on OCR's past Title VI enforcement activities on behalf of language-minority students.

The data which OCR submitted to Congress provided evidence of a dramatic slackening of effort to protect language-minority students after January 1981. An *Education Week* analysis of the data revealed that school districts were nine times less likely to be scheduled for a Title VI *Lau* review during the first five years of the Reagan administration than they were in the preceding five years.[225] Between 1976 and 1980,OCR carried out Title VI *Lau* compliance reviews in 573 school districts. In the first five years of the Reagan administration, however, only ninety-five Title VI *Lau* compliance reviews were conducted in sixty-six school districts. Monitoring visits to check on a school district's implementation of voluntary *Lau* plans also fell off sharply during this period.

The OCR data also reflected continuing discrimination against language-minority students. Despite the Department's utilization of flexible and permissive Title VI compliance standards, OCR found legal violations in 58 percent of the *Lau*-related investigations carried out since 1981.[226]

Accordingly, it is *recommended* that OCR and the Department recommit the federal government to protecting the civil rights of limited-English-proficient national-origin minority-group students. There should be a major increase in the number of OCR school district monitoring visits and compliance reviews. These monitoring visits and compliance reviews should be targeted on, but not limited to, districts which OCR survey data and other public information indicate are likely to be in noncompliance with the requirements of Title VI. At the same time, OCR must expand outreach efforts to inform both school officials and the parents of language-minority students of their responsibilities and rights under law.

In addition, while the Department has withdrawn proposed compliance standards and previous *Lau* guidelines, it has not officially promulgated new guidelines and standards. School personnel and parents both need, and deserve, federal guidance in this critical and complex civil rights area. It is thus *recommended* that OCR and the Department act quickly to provide legally and educationally sound guidance concerning the Title VI responsibilities of schools serving limited-English-proficient students. This guidance can be provided through new regulations of general applicability, through a public reporting service of OCR individual case-determinations, or a combination of both.

With respect to ensuring equal educational opportunity for limited-English-proficient students, as in the other areas discussed in this analysis, the Department and OCR have failed to fulfill their responsibilities over the last eight years. Implementation of the recommendations suggested in this analysis is critical to provide for effective protection of civil rights and equal educational opportunity for America's school children.

IV. Summary of Recommendations

A. The Civil Rights Division

1. Initiation of new cases

The Division should significantly increase its efforts to investigate and file new cases to combat the continuing problems of school segregation and inequality of educational opportunity, focusing its efforts on cases attempting to achieve metropolitan-wide desegregation and to pursue the link between segregated housing and segregated schools.

2. Seeking remedies for illegal segregation and denial of educational opportunities

a. Opposition to use of mandatory student reassignment plans

The Division should end its rigid opposition to the use of mandatory transportation as a remedy in school desegregation cases, and should return to its previous policy of considering the use of all available remedies and of supporting relief which would be most effective in individual cases.

b. Reliance on purely voluntary measures and opposition to enforceable relief

The Division should employ magnet schools and other voluntary desegregation methods, both in settling and litigating cases, only where they are part of an overall desegregation effort including effective enforcement or backup measures and will not impair educational opportunities of children in nonmagnet schools. Division policy should seek to effectuate the principle established by the Supreme Court that affirmative steps must be taken to eliminate school segregation and its effects to the maximum extent possible.

c. Refusal to seek and opposition to necessary funding for effective desegregation and equality of educational opportunity

The Division and the entire federal government should support the provision of funding necessary for magnet schools and other voluntary desegregation programs and for compensatory and remedial education programs. In particular, the Division should seek and support remedies pursuant to *Milliken v. Bradley*, 433 U.S. 267 (1977), to require State governments to help fund magnet, compensatory, and remedial programs to assist in remedying the vestiges of segregation.

d. Refusal to seek systemwide remedies

The Division should seek systemwide relief in desegregation cases in accordance with *Keyes v. School District No. 1*, 413 U.S. 189 (1973), and should fully utilize the principles of *Keyes* in initiating and conducting school desegregation litigation.

e. Reversal of opposition to tax exemptions for discriminatory private schools

The Division should support methods at the State, local, and federal level to combat discrimination by private schools and to prevent the use of private schools to avoid desegregation, including requesting court orders in desegregation cases litigated by the Division.

3. *Termination of litigation: the issue of unitary status*

The Division should adhere to the principle that a school district can be declared unitary only if it has actually eliminated all vestiges of segregation to the maximum extent practicable, including harmful educational and residential segregative effects of school segregation. In addition, the Division should return to its previous practice of not initiating attempts to have a school district declared unitary and thus dismiss desegration claims against it. The Division should consult specifically with OCR and all parties to a case before deciding what position to take with respect to a request to declare a district unitary, or dismiss a case, and should not support such a request where there are recent or unresolved complaints of discrimination or vestiges of segregation which can be elimiated by further action. Where cases are to be dismissed, the Division should explore the possibility of keeping in place injunctions which prohibit future discrimination, or call for the continuation of desegregation plans when necessary. The Division should also support the principle that where an injunction calling for desegregation has been entered, the defendant must bear the burden of proving changed circumstances sufficient to justify modifying or eliminating the injuction.

B. The Department of Education and the Office of Civil Rights

1. *Processing of complaints*

OCR should seek to expend properly all funds appropriated for its enforcement activities and request additional funding as necessary. OCR should institute additional monitoring and develop guidelines to avoid improperly suspending or delaying the processing of OCR complaints and help promote compliance with the *Adams* timeframes. This may include modifying or providing additional flexibility in meeting such timeframes in some types of cases, such as complex, multi-issue, multiparty cases. Any changes in the *Adams* timeframes should be accomplished through notice-and-comment rulemaking by the Department. Efforts should also be made to improve the efficiency of case processing where possible without compromising quality. OCR should promulgate and distribute policy directives on civil rights enforcement issues on a timely basis, consistent with applicable law, to OCR regional offices and the general public. In addition, OCR should analyze and develop proposals for possible joint OCR-state handling of individual complaints now processed by OCR.

2. *Initiating and conducting compliance reviews*

OCR should return to the methodology used prior to 1984 in its vocational and civil rights surveys, and determine whether a comprehensive national resurvey is needed for 1990. In conjunction with improving the complaint investigation process, OCR should also seek to develop methods to increase the number and role of compliance reviews as part of the OCR enforcement process. Selection of compliance review sites should be based on qualitative criteria such as OCR survey data rather than random selection. OCR should also remove restrictions on conducting compliance reviews of districts which are subject to court or OCR-approved desegregation plans or have requested technical assistance from OCR, and should study other ways to help prevent potential conflicts between OCR's enforcement and technical assistance functions. OCR should also develop policies to use its authority under the federal magnet school assistance program to gather and evaluate data effectively to determine compliance with civil rights laws, including establishment of a policy to utilize an "effects test" in clearing districts to receive magnet funds. Compliance reviews should generally be systemwide rather than focusing on particular isolated programs.

3. *Obtaining relief for civil rights violations*

OCR should develop and implement guidelines for its enforcement and settlement practices. These guidelines should focus on determining which types of enforcement should be used in particular cases, avoiding delays when cases are referred to the Division, ensuring that settlements in cases where violations are found actually correct violations, prohibiting reliance on assurances of good faith or future actions in settlements without effective monitoring to ensure actual performance, and ensuring that resolution of cases prior to the issuance of findings is in accord with applicable laws and regulations. OCR should abolish the use of "violation corrected" Letters of Findings and return to its prior practice of issuing Letters of Findings with findings of fact and conclusions of law before negotiating corrective action. OCR should also return the quality assurance program to the national level to perform its previous functions of assessing the quality of OCR work and assuring consistent implementation of policy.

4. *Remedying in-school segregation*

OCR should focus its attention on the issue of in-school segregation, particularly in formerly segregated school districts. OCR should consider sponsoring general research into particular types of tests used by multiple school districts to assign students to classes as to which concerns have been raised of discrimination of minorities, which can be used to help identify and take action with respect to districts with problems of in-school segregation.

5. *Enforcing prohibitions against sex discrimination*

OCR should once again aggressively enforce complaints of sex discrimination, and should develop uniform guidelines to be sent to each regional office concerning the processing of different types of complaints of sex discrimination. OCR should also establish a more comprehensive monitoring procedure to ensure that school districts which have violated Title IX in the past have actually corrected their procedures so that they are in compliance with Title IX at the time of any settlement agreement, and so that they remain in compliance thereafter. As part of what should become a comprehensive monitoring system, OCR should require that districts collect and maintain information on the nature and extent of sex equity activities, and OCR should analyze which activities prove most successful. OCR should also resume its practice of broad audits of educational institutions suspected of discrimination. This should include analyses of tests which appear to severely impede academic opportunities for female students. The Department should actively promote the development and dissemination of model sex equity programs, such as programs to improve voluntary compliance with Title IX, and increased funding should be provided for the Women's Educational Equity Act and other initiatives to combat sex discrimination in education.

6. Ensuring equal educational opportunity for limited English proficient students

The Department of Education should take steps to improve federal counts, estimates, and projections of the language-minority and LEP student populations. The Department should avail itself of all pertinent federal data as well as statistics gathered by state and local agencies. In analyzing these data, the Department should utilize the services of individuals with professional expertise in the demography of American language-minority populations.

The Department of Education should seek significant additional appropriations for Bilingual Education Act programs. Its 1989-90 budget request should seek to restore such funding to fiscal year 1980-81 levels adjusted for inflation. Subsequent budget requests should provide for sustained real growth in the federal bilingual education program.

The Department should propose in its next budget request to provide equal funding for Developmental Bilingual Education and Special Alternative Instructional Program grants, the two instructional program alternatives to Transitional Bilingual Education, which should also receive continued strong federal support. Expanded support for Developmental Bilingual Education programs should be treated as a top civil rights and education priority.

OCR and the Department should recommit the federal government to protecting the civil rights of limited-English-proficient national-origin minority students. There should be a major increase in the number of OCR school district monitoring visits, and they should be targeted on, but not limited to, districts which OCR survey data and other public information indicate are likely to be in noncompliance with the requirements of Title VI. At the same time, OCR must expand outreach efforts to inform both school officials and the parents of language-minority students of their responsibilities and rights under law. OCR and the Department should act quickly to provide legally and educationally sound guidance concerning the Title VI responsibilities of schools serving limited-English-proficient students. This guidance can be provided through new regulations of general applicability, through a public reporting service of OCR individual case determinations, or a combination of both.

CHAPTER VIII

AFFIRMATIVE ACTION IN HIGHER EDUCATION: THE CONSTITUTIONAL CONSTRAINTS

by Professor Gil Kujovich ©

I. Introduction

The statistical summary provided in Chapter IX, demonstrates that equality in higher education has not been achieved. Federal efforts to reach that goal through policy initiatives that do *not* use racial classifications--such as increased funding of Upward Bound or financial aid to needy college students--raise no serious constitutional issues. Such broadly based programs, however, have the disadvantage of not targeting the racial and ethnic minorities most severely under-represented in higher education. The most direct and efficient means of achieving racial equality in higher education necessarily involves the racial targeting of federal programs. A racially based allocation of governmental benefits, however, raises complex issues of constitutional law. The constitutional principles defining the reach of federal power to remedy racial imbalances in higher education are the subject of this discussion.

Constitutional principles of equality were early interpreted to impose the strictest limits when the government uses racial classifications that *disadvantaged* a racial minority. One clear purpose of the equal protection clause was to protect the nation's black population from racial discrimination. Not long after the Fourteenth Amendment was adopted, the Supreme Court held more generally that the clause afforded its strictest protection to other racial and ethnic minorities.

The basis for this interpretation is the position of minorities in American society. Minorities traditionally have lacked effective political power, have historically been subjected to discrimination, and have been the targets of racial prejudice. When minorities are disadvantaged by a racially based classification, there is good reason for a court to be "suspicious" of the classification and to strictly scrutinize the governmental justifications for using it.

In light of the manner in which racial minorities--and particularly blacks--were treated by both the state and federal governments in the first century after the adoption of the Fourteenth Amendment, it is not surprising that it was not until the 1970s that the Court first confronted the issue of whether a racial classification *favoring* a racial minority should be evaluated under the same strict standards used for those disadvantaging minorities. There are a variety of reasons why a governmental body may choose to use such "benign" racial classifications. For purposes of the present discussion, the most important of these is the use of racially based "affirmative action" to remedy past racial discrimination and its effects. Beginning in 1978, the Supreme Court has decided a small group of cases concerning racially based affirmative action with remedial purposes.

Section II of this Chapter reviews briefly the history of discrimination in higher education against the nation's largest racial minority--black Americans. Section III discusses the Supreme Court's cases concerning the constitutionality of remedial affirmative action undertaken by state and local governmental bodies. Section IV considers whether the constitutional constraints are different when the federal government undertakes affirmative action. Finally, Section V explores some of the policy implications of the affirmative action cases and suggests some affirmative action policy initiatives that might be undertaken by a new administration.

II. The History and Legacy of Racial Discrimination in Public Higher Education[1]

For nearly a century after the Civil War, America's black population received the benefits of publicly supported higher education almost exclusively through a system of "separate but equal" institutions established in the southern and border states. The black public colleges created after the War were always racially separate, but never equal. Consequently, the black population was denied the educational, economic, and social advantages afforded to the nation's white population through the rapid expansion of public higher education between 1860 and 1960.

In both state and federal funding, blacks suffered consistent and long-lasting discrimination in public higher education. As late as 1940, when black Americans accounted for more than 20 percent of the population in the "separate but equal" states, black public colleges expended only five percent of the public funds devoted to higher education. Nearly 60 percent of all blacks in the *nation* resided in states that offered their black citizens only one or two small, underfunded public colleges. In states accounting for 40 percent of all black Americans, there was *no accredited* public college available to black students.

Insufficient funding, combined with the accumulated deficiencies of an inadequate educational system, from primary school to college, produced an educational program at black public colleges that fell far short of equality. Training in the sciences and for the professions was not available to black students. The would-be black engineer, enrolled in a public college, was limited to the study of auto mechanics, carpentry and printing, while the aspiring biologist, chemist, or physicist was frequently restricted to the study of general science.

The NAACP's campaign to overturn the constitutional doctrine of separate but equal brought some improvements in black higher education during the 1940s and 1950s, but equality in the racially separate system was never achieved. Underfunded out-of-state scholarship programs (continued long after the Supreme Court found them constitutionally insufficient), efforts to pool resources for regional education of blacks, and grossly inadequate increases in the funding of black colleges were among the unsuccessful efforts made to defend against the constitutional assault on separate but equal education. When the doctrine of separate but equal suffered its inevitable demise in the 1950s, the effects of long-lasting discrimination were painfully evident in the black population.

One effect of long-lasting discrimination was a black population severely deprived of education. In the segregationist states in 1950, 19 percent of persons aged 25 and older were blacks, but blacks constituted less than 7 percent of the college-educated population. Black representation in the professions reflected the century-long denial of access to publicly supported professional schools and programs of advanced training:

> One need not embrace a system of racial 'quotas' for the professions to find discrimination and injustice in a black work force of more than 3.5 million that included only 4600 lawyers and judges, engineers, chemists and other natural scientists, physicians and surgeons, dentists, pharmacists, architects, accountants and auditors, surveyors, designers and draftsmen--just over one percent of the 401,000 professionals in these categories.[2]

Discrimination in education below the college level yielded a population of black youths who graduated from high school at less than half the rate of white youths. For those black students who did graduate, continuing inequality in elementary and secondary education left many ill-prepared to take advantage of gradually broadening opportunities for higher education. The legacy of discrimination persisted, and could not be remedied simply by affording black youths the chance for "equal competition" with whites in college admissions.

The persistent effects of past discrimination are evident today in the continuing underrepresentation of blacks in the nation's colleges and graduate schools. And, as suggested in Chapter IV, those continuing effects are compounded and amplified by the concentration of black students in separate and unequal, inner-city elementary and secondary school systems. If the long-deferred goal of equality in education is to be achieved, aggressive and effective affirmative action is essential. The scope and nature of such affirmative action will be shaped, in part, by the constitutional constraints on the use of racially based classifications.

III. Constitutionality of Affirmative Action By State and Local Governmental Bodies

In the past decade, the Supreme Court has decided only a few affirmative action cases raising constitutional issues. The first of these, *Bakke*, is an unusual case in that only five of the justices considered the constitutional issues, and they could not agree on how those issues should be decided. Nevertheless, *Bakke* is important because it defined, even if it did not resolve, the major constitutional issues.

A. University of California Regents v. Bakke

During the early 1970s, the Medical School of the University of California at Davis created an affirmative action admissions program by setting aside sixteen positions (of one hundred total) for disadvantaged minority applicants. Applicants for the sixteen positions were evaluated separately from the general applicant pool. Alan Bakke, a rejected white applicant, claimed that the minority admissions program was unconstitutional because it excluded him from its benefits on the basis of his race. In a 5-4 decision, the Supreme Court invalidated the affirmative action admissions program.[3]

Understanding the constitutional aspects of *Bakke* requires an examination of two opinions in the case: that of Justice Powell and that of Justice Brennan. Although neither opinion commanded a majority of the Court, the opinions define the two major issues that have come to dominate affirmative action cases: (1) under what circumstances is the government's interest in remedying discrimination substantial enough to justify the use of a racial classification and (2) what constitutes a sufficiently narrow tailoring of the classification to that remedial purpose.

Both justices agreed that the purpose of remedying past racial discrimination can be sufficiently weighty to justify racially based affirmative action. They disagreed on the conditions necessary to establish the constitutionally adequate purpose.

Justice Brennan concluded that affirmative action by an institution of higher education is constitutional when it is designed to remedy past discrimination regardless of whether the particular institution had engaged in discrimination or, more generally, the discrimination was by society at large. As long as the racial minorities aided by the program are substantially and chronically underrepresented, and there is a sound basis for concluding that the underrepresentation is the product of past discrimination, racially based affirmative action is constitutional.

Justice Powell created narrower constraints on the remedial use of affirmative action. Under his view, racially based remedies are not a constitutionally acceptable means of remedying "societal discrimination." To justify affirmative action, there must be a finding of discrimination more specific than that by society at large. Although his *Bakke* opinion is not completely clear, Justice Powell seemed to conclude that affirmative action can be used to remedy only that discrimination for which the body engaging in affirmative action is responsible.

The two justices also differed on how precise a connection there must be between the racial classification and the remedial goal. This connection, or "fit," can be expressed in terms of the "victim specificity" of the program. Justice Powell seemed to demand a very narrow fit that would restrict the benefits of an affirmative action program to actual and identified victims of past discrimination. Justice Brennan, however, seemed to require only that the benefitted individuals belong to a racial minority that, as a group, suffered from past discrimination.

Bakke thus defined two key constitutional issues: (1) whether affirmative action programs must be so narrowly tailored as to limit their benefits to identified victims of discrimination and (2) whether such programs can be used to remedy racial discrimination beyond that of the body engaging in affirmative action.

B. The Post-*Bakke* Cases

In two cases decided nearly a decade after *Bakke* the Court elaborated on the extent to which the Constitution demands victim specificity to justify an affirmative action remedy for past discrimination. In a third case, the Court returned to the question of whether affirmative action remedies may be used to remedy "societal discrimination."

1. Victim-Specificity.

In *Sheet Metal Workers v. EEOC*,[4] a union engaged in longstanding discrimination against nonwhite persons seeking to join the union. The remedy ordered by the district court included a union membership goal of 29 percent nonwhites and the creation of a fund for training and recruitment of nonwhite apprentices and union members. In *United States v. Paradise*[5], the Alabama Department of Public Safety (state police) engaged in an extended pattern of discrimination against blacks. After the Department's long delay in complying with a variety of remedial orders, the district court ordered that promotions to any rank with fewer than 25 percent blacks had to be done at the rate of one black for each white promoted. The remedies in both cases were challenged as unconstitutional racial preferences for persons not identified as victims of the defendants' past discrimination.

In 5-4 decisions, the Supreme Court upheld the affirmative action remedies ordered by the lower courts.[6] In so doing, a plurality of the Court endorsed a potentially far-reaching justification for affirmative action relief.[7] This justification recognizes that affirmative action may be used to remedy the *effects* of discrimination that continue even after discriminatory actions have ended. The effects specifically considered in the two cases were what might be described as "structural" effects.

After an employer has ceased its unlawful acts, its reputation for discrimination and the absence of or small percentage of minorities may continue to discourage minorities from even applying.[8] Or applicant pools may be created through informal contacts unavailable to potential minority applicants. And the absence of minorities in the upper ranks of an employer's workforce may itself be an effect of discrimination in initial hiring.[9] In *Sheet Metal Workers* and *Paradise*, a plurality of the Court found affirmative action in hiring and promotion a constitutionally acceptable means of remedying these structural effects of discrimination.

In both cases, judicial determinations of substantial and long-lasting discrimination by the defendants created a compelling governmental interest in remedying that discrimination and its effects. In considering whether the affirmative action remedies were "narrowly tailored" to that interest, however, the Court could not, and did not, require that the remedy be confined to identified victims of discrimination. The remedies were directed to the structural effects of discrimination and did not even purport to target victims:

> The purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of . . . discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members; no individual is entitled to relief and beneficiaries need not show that they were themselves victims of discrimination.[10]

Instead of victim specificity, the plurality adopted a multifactored test to determine when an affirmative action remedy is narrowly tailored: (1) efficacy of alternative remedies, (2) flexibility and duration of the affirmative action remedy, (3) basis for a percentage goal, and (4) impact on innocent third parties.[11] In general, these factors are designed to ensure that the harm to innocent third parties is minimized and that affirmative action is not used to achieve racial balance for its own sake, but has a genuine remedial function.

Sheet Metal Workers and *Paradise* are important refinements of the constitutional limits on the use of affirmative action. The cases, however, have two significant limits. First, because they focused on the *structural* effects of past discrimination, they did not consider whether victim specificity is constitutionally required when affirmative action is used to remedy the effects of past discrimination manifested in the minority populations which have been subjected to discrimination. Second, the two cases provide no further insight into the nature of discrimination that will justify an affirmative action remedy. In both cases, there were clear judicial findings that the defendants themselves had engaged in persistent and egregious racial discrimination.

The question of whether affirmative action could constitutionally be used to remedy the effects of more broadly based discrimination was considered in another of the post-*Bakke* cases.

2. *The Nature of Past Discrimination.*

In *Bakke*, Justice Powell concluded that an affirmative action admissions program could not be justified as a remedy for "societal discrimination," a notion he rejected as "an amorphous concept of injury."[12] The opinion, however, is nearly opaque as to the meaning of the term "societal discrimination" and thus as to the nature of past discrimination that Justice Powell considered inadequate to justify an affirmative action remedy.

Nearly a decade later, in *Wygant v. Jackson Board of Education*[13], Justice Powell provided further clarification. In *Wygant* a local school board undertook voluntary affirmative action that resulted in the laying off of white teachers who had more seniority than minority teachers who were retained. Displaced white teachers claimed that the racial preference violated the equal protection clause. Initially denying that it had itself discriminated in the employment of teachers, the board nevertheless defended its layoff procedure as an effort to remedy the effects of societal discrimination.

Justice Powell rejected societal discrimination as "too amorphous a basis for imposing a racially classified remedy":

> No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficnt and over-expansive. In the absence of particularized findings, a court could

> uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.[14]

Justice Powell defined "societal discrimination" to include any discrimination *except* that engaged in by the governmental unit using an affirmative action program:

> This Court has never held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.[15]

Read together, *Wygant, Sheet Metal Workers*, and *Paradise* offer only narrow opportunities for affirmative action in higher education. Under *Wygant*, previous discrimination by the institution engaging in affirmative action is a constitutionally required predicate, whether the affirmative action program is voluntarily undertaken or judicially ordered. Where the predicate of past discrimination is established, however, the Constitution permits affirmative action that benefits nonvictims to eliminate at least the structural vestiges of discrimination.

The cases thus seem most relevant to desegregation remedies for what were once separate but equal systems of public higher education. Continuing racial duality in the public colleges of the southern and border states is a structural effect of past discrimination. Affirmative action designed to eliminate that effect, and that complies with the limits of *Sheet Metal Workers* and *Paradise*, would not violate the Constitution.

Whether the Constitution permits broader programs of affirmative action in institutions across the nation, regardless of whether those institutions have themselves discriminated on the basis of race, depends on Congress's power to enact statutes providing for affirmative action remedies.

IV. Congressional Power to Enact Affirmative Action Remedies

The Supreme Court's affirmative action cases include only one case considering congressional power to use race conscious measures as a means of remedying past discrimination. Understanding that case requires a brief exploration of earlier cases defining congressional power under the enforcement clauses of the Civil War Amendments.

A. The Enforcement Clause Cases

Each of the Civil War Amendments grants to Congress the power to enforce, by appropriate legislation, the provisions of the amendments. During the 1960s, the Court developed an expansive view of congressional authority under the enforcement clauses, upholding federal civil rights statutes as long as the enforcement means selected by Congress was a rational one. For present purposes, the most important of these cases are those concerning the Voting Rights Act of 1965 and its amendments.[16]

As developed in these cases, congressional power under the enforcement clauses goes beyond the authority to prohibit governmental actions that directly violate the Constitution. Congress also has the power to prohibit otherwise constitutional actions in order to remedy the effects of discrimination. This remedial authority and its relationship to affirmative action is evident in enforcement clause cases concerning the Voting Rights Act's banning of literacy tests as a qualification for voting.

As originally enacted, the ban on literacy tests applied for five years to statutorily defined covered jurisdictions. A covered jurisdiction could "bail out" from coverage by establishing that the prohibited test had not been used in a discriminatory manner during the previous five years.[17] The literacy test ban is of particular interest since the Court had six years earlier rejected an equal protection challenge to the use of the literacy tests.[18] Thus, Congress had exercised its enforcement powers to prohibit a practice that did not necessarily violate the Constitution.

In *South Carolina v. Katzenbach* the Court upheld the five-year suspension of literacy tests as a constitutionally permissible means of addressing the effects of past discrimination. The Court held that even if the tests were fairly administered, they would perpetuate or "freeze the effect of past discrimination in favor of unqualified white registrants" who had registered to vote before the test had been adopted.[19] Although a fairly administered literacy test did not violate the Constitution, Congress could prohibit such tests as a means of remedying the effects of past discrimination.

In *Gaston County v. United States* the Court took the next step and upheld Congress's power to prohibit otherwise constitutional actions in one governmental activity as a means of addressing the effects of past discrimination in another governmental activity. In rejecting the county's effort to bail out from the literacy test ban, the Court relied on the fact that the test fell more heavily on black residents to whom the county had denied equality in public education. Assuming that the literacy test was administered without racial discrimination, the Court concluded that it was within the congressional enforcement power to prohibit use of a test that "would serve only to perpetuate [past] inequities in a different form."[20]

The reach of the enforcement clauses to remedy the effects of past discrimination was somewhat limited by the facts of *Gaston County*. The county was both the agent of past discrimination in education and the governmental body perpetuating the effects of that discrimination. Thus, the case did not raise the question of whether Congress could remedy the effects of "societal discrimination," as that term was later defined in *Wygant*. Nevertheless, the Court observed in dicta that "[i]t would seem a matter of no legal significance that [Gaston County's voters] may have been educated in other counties or states also maintaining segregated and unequal school systems."[21]

This dicta became law when Congress amended the Voting Rights Act in 1970 to include a nationwide suspension of literacy tests. Arizona challenged this amendment, claiming that it had not discriminated either in education or in the use of its literacy test, and that it "should not have its laws overridden to cure discrimination on the part of governmental bodies elsewhere in the country."[22] In *Oregon v. Mitchell* the Court upheld this exercise of the enforcement power to remedy what is now called societal discrimination.

Justice Brennan, writing for three justices, concluded that the congressional power to remedy the effects of educational discrimination "does not end when the subject removes himself from the jurisdiction in which the injury occurred."[23] Justice Stewart, also writing for three justices, concluded that Congress was not required to make state-by-state findings on inequality of educational opportunity or on the actual impact of literacy tests. Unlike a court, which is confined to deciding individual cases on individual records, "Congress may paint with a much broader brush."[24] In Justice Stewart's view, nationwide legislation was appropriate when Congress acts against an "evil such as racial discrimination which in varying degrees manifests itself in every part of the country."[25]

B. Comparison of Enforcement Clause and Affirmative Action Cases

In both *Sheet Metal Workers* and *Paradise* the remedial orders were limited to the effects of the defendants' clearly identified discrimination. More generally, *Wygant*'s definition of "societal discrimination" makes defendant-specific, past discrimination a constitutional requirement for an affirmative action remedy. In the enforcement clause cases, however, the Court upheld a congressional power to remedy the effects of "societal discrimination."

The reasons for this are clear. Congress does not decide individual cases based on individual records. Its jurisdiction and responsibilities extend to the nation. In devising national policies to remedy the legacy of discrimination, as in other legislative activities, congressional factual inquiries and fact findings are necessarily more general. Indeed, it would be an abandonment rather than a fulfillment of its responsibility under the Fourteenth Amendment, if Congress focused its remedial powers only on the discriminatory acts of discrete actors and not on the effects of discrimination in the broader society.

With regard to the issue of victim specificity, the enforcement clause cases go beyond the "structural" effects of past discrimination that were the subject of affirmative action remedies in *Sheet Metal Workers* and *Paradise*. The enforcement clause remedies were directed to those effects of past discrimination that manifest themselves in the minority population--the continuing effects of educational deprivation. Nevertheless, the Court did not require case-by-case determinations of which individuals were actual victims. Congress could constitutionally rely on a broadly based relief that reached actual victims as well as some nonvictims.

Again, the reasons for this flexibility in the congressional remedial power is not difficult to discern. When Congress seeks to remedy the effects of educational discrimination, the task of defining which specific individuals suffer from those effects is a formidable one. In suspending literacy tests, for example, Congress had a clear basis for concluding generally that racial inequality in education affected the number of blacks permitted to vote. If, however, the remedy for past discrimination were limited to persons who could establish that their ability to pass a literacy test was actually impeded by past denial of educational equality, the enforcement and effectiveness of remedial legislation would have become an unmanageably complex matter. The effects of discrimination in education can be both subtle and varied. Determinations of which individuals were sufficiently victimized by past discrimination--or even what constitutes sufficient victimization--would not only generate costly and time-consuming litigation but would impose an unrealistic burden on the implementing governmental body and, ultimately, the courts.

The enforcement clause cases suggest an answer to but do not decide the question of whether the principles governing the constitutionality of race-conscious affirmative action are different when Congress undertakes the affirmative action remedy. The cases establish that the remedial power under the enforcement clauses can reach societal discrimination and that Congress need not restrict itself to victim specific remedies. They do not, however, consider the scope of that power in the context of a racially based remedy. Although Congress sought to provide relief to minority voters who had suffered educational discrimination, the Voting Rights Act did not distinguish among voters on the basis of race: the suspension of literacy tests applied to all voters. Unlike the affirmative action cases, there were no white persons who could claim to be disadvantaged by a racial classification.

Congress's use of affirmative action to remedy past discrimination thus presents a conflict between the broad remedial power upheld in the enforcement clause cases and the more restrictive remedial authority applicable to affirmative action undertaken by governmental bodies other than Congress. While the Court has not yet clearly resolved that conflict, it revealed some of the relevant considerations, and difficulties, in *Fullilove v. Klutznick*.[26]

C. Affirmative Action by Congress

In *Fullilove* the Court upheld, 6-3, federal legislation mandating that recipients of federal funds for public works use at least 10 percent of such funds to purchase services or supplies from "minority business enterprises" (MBE).[27] Although a majority of the Court did not agree on a rationale for its judgment that the statute was constitutional,[228] the six members of the Court voting to uphold the statute did agree on one important point.

All six justices in the majority explicitly recognized that Congress had the broadest governmental power to remedy past discrimination and its effects. More specifically, the majority opinions implicitly, but clearly, rejected the view that Congress lacked power to adopt race-conscious, affirmative action remedies for societal discrimination, as that term was subsequently defined in *Wygant*. The congressional determination of past discrimination in *Fullilove* was of the most general sort.[29] Congress did not make specific findings of discrimination in public construction contracts by particular state and local governments. Nor was there any indication that Congress itself had discriminated in disbursing federal contracting funds. Finally, neither the statute nor the regulations implementing it exempted a state or local government that had not engaged in past discrimination.[30]

In this regard *Fullilove* extends the power recognized in the voting rights cases to affirmative action remedies. The congressional enforcement power may constitutionally be applied to remedy the effects of broadly based discrimination--whether it be in public contracting funds or in education. In requiring remedial action, the congressional power reaches to entities that may not themselves be guilty of any past discrimination. The authority of Congress depends on its conclusion that the effects of past discrimination continue, not on the particular sources of discrimination or on the "guilt" of the entities required to implement the remedial action.[31]

Fullilove is more ambiguous on the issue of victim specificity. It appears that in enacting the set-aside the general focus of congressional concern was on the victimized class and not the structural effects that justified affirmative action remedies in *Sheet Metal Workers* and *Paradise*.[32] Moreover, on its face, the statute did not require individualized determinations identifying specific victims. Rather, Congress appeared to afford the set-aside benefit to all members of the victimized racial groups.

The absence of victim specificity in the statute was not a concern to four of the six justices in the majority. Without discussing the victim specificity issue, Justice Marshall (writing for three justices) and Justice Powell (writing for himself) seemed to conclude implicitly that affirmative action remedies enacted by Congress share a substantial measure of the flexibility evident in enforcement clause cases not involving racial classifications. Congressional remedies for past discrimination may be painted with a broader brush and confer benefits on nonvictims as part of the effort to afford relief to victims.

Fullilove's ambiguity concerning victim specificity is found in the opinion authored by the Chief Justice (and joined by two additional justices). Through a creative construction of the statute and its implementing regulations, Chief Justice Burger concluded that the set-aside program prohibited set-aside awards to nonvictim minority businesses. Although his opinion falls short of complete clarity, the Chief Justice seemed to conclude that congressionally enacted affirmative action remedies require victim specificity and that the set-aside program in *Fullilove* met that requirement.

Dissenting, Justice Stevens questioned whether the determinations required by Chief Justice Burger's interpretation of the statute were feasible:

> [I]t is not easy to envision how one could realistically demonstrate with any degree of precision, if at all, the extent to which a bid has been inflated by the effects of disadvantage or past discrimination. Consequently, while the Chief Justice describes the set-aside as a remedial measure, it plainly operates as a flat quota.[33]

Justice Stevens' observation, that it is unrealistic to make precise distinctions between those who have been sufficiently victimized by past discrimination and those who have not, is surely correct. The effects of discrimination may be subtle, not easily proven, and may manifest itself in differing ways and degrees in different persons. The inability to make precise distinctions as to those effects, however, does not mean that general measures designed to counter them lose their remedial character. The allocation of public works funds to minority businesses, just as the nationwide suspension of literacy tests, used a broad sweep to ensure that actual victims would not be excluded from the remedy and thus necessarily extended benefits to some nonvictims.

In his *Fullilove* opinion, Chief Justice Burger observed:

> It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.[34]

To say that congressional affirmative action measures targeted on a victimized group are invalid because of their failure to satisfy a demand for victim specificity would be tantamount to concluding that the organ of government with the most "comprehensive remedial power" lacks the authority to remedy what may be the most persistent effects of racial discrimination. The unique remedial authority and competence of the national legislature is most needed where the effects of discrimination are least amenable to remedy through case-specific decisions. If Congress cannot act in response to the subtle influences of the long-lasting discrimination, then no governmental body can.

The primary concern behind the demand for victim specificity is the interest of innocent third parties. Affirmative action involves a racially based denial of some benefit to innocent persons. When the beneficiary of affirmative action has suffered a wrong, the victim's entitlement to a remedy weighs against the third party's interest in not being burdened by a racial classification. Thus, a "narrow tailoring" of remedies to victims is one method of protecting those adversely affected by affirmative action. It is not, however, the only method.

In their refashioning of the narrow tailoring requirement, *Sheet Metal Workers* and *Paradise* provide an alternative. Third party interests can be protected by ensuring that a race conscious remedy is not used when the remedial goals can be accomplished as effectively with racially neutral remedies, by requiring that affirmative action remedies be flexible and of limited duration, and by attention to the nature and distribution of the burdens on third parties. Under *Sheet Metal Workers* and *Paradise*, these forms of narrow tailoring are constitutionally adequate when affirmative action is directed to the *structural* effects of past discrimination without regard to whether *any* of the beneficiaries are victims. They should also be adequate when Congress, the body with the most comprehensive remedial authority, seeks to remedy the effects manifested in the victims of discrimination.

Consideration of both the affirmative action and enforcement clause cases suggests that Congress has a remedial power sufficiently broad to make significant progress toward the achievement of equal opportunity in higher education. Its power, under the enforcement clauses, to develop remedies for the effects of past educational discrimination is indisputable. That power clearly extends to discrimination more broadly based than that of specific actors. It also includes the use of race conscious affirmative action. While the key case--*Fullilove*--is somewhat ambiguous, a compelling argument can be made that in employing affirmative action remedies Congress is not bound by an inflexible requirement of victim specificity.

V. Affirmative Action Policy and Implications of the Constitutional Constraints

The use of racially targeted policies is not, in itself, an assurance that racial equality will be achieved in higher education. The policy initiative outlined in Section A of this part is a tentative suggestion subject to modification, or rejection, after a more careful inquiry into the causes of inequality in higher education today. Section B of this part discusses more general policy implications of the constitutional constraints on the use of affirmative action. These implications apply to both the policy initiative suggested in Section A and to other affirmative action policy initiatives.

A. Affirmative Action to Achieve Equality In Higher Education

The most important characteristic of an effective affirmative action program is that it be designed to overcome the disabilities of discrimination so that minority students develop the skills necessary for success in higher education and beyond. Affirmative action that merely admits underprepared minority students into college is a temporary and illusory benefit. Rather than providing for the waiver or relaxation of college admissions requirements, an affirmative action program should ensure that minority students have the educational background deemed essential for success by institutions of higher education.

Consequently, an effective program must begin before college. The funding of four-year, college-preparatory programs specifically designed to meet the educational needs of minority students would be a starting point. The content of such programs should be developed jointly by public high schools (perhaps beginning with those having high concentrations of minority students) and state institutions of higher education. The involvement of the higher education community would take the form of high school curriculum development, summer instruction on the college campus, and continuing education for high school faculty involved in the program. Participation of state colleges would be encouraged by federal funding for the program *and* the conditioning of other federal aid to the colleges on the development of successful, cooperative programs.

Students who successfully complete the program would be assured admission into one or more of the state's four-year public colleges.

In addition, needy students would receive a package of state and federal financial aid adequate for them to meet the expenses of their higher education. The combination of assured admission and financial aid would provide students with strong incentives to complete the program. Institutions of higher education would also have a stake in the success of the program. The incentives of federal funding, commitment of state financial aid resources, and the assured admission feature should help convert public colleges from passive recipients of applicants into active educators of qualified minority students.

Involvement of the federal bureaucracy would not extend to the educational content of the program. High schools and colleges would have substantial flexibility in devising their cooperative programs and experimentation would be encouraged. Federal funding incentives would be tied to the actual successes of a program, not to the predications of the federal bureaucracy as to whether a proposed program will succeed.

If the model of cooperative, affirmative action programs proves effective, it could be expanded to include other elements of a state's system of public education. For example, cooperation between four-year colleges and community colleges might be used, or cooperation between undergraduate schools and graduate or professional schools. In each instance, the level of public education to which students go after completing the program would have a significant stake in the success of the program and a significant role in achieving success. The responsibility for remedying the effects of past discrimination and moving toward racial equality would be shared by each part of the system of public education.

B. Implications of the Constitutional Constraints On Affirmative Action

In developing any affirmative action policy to remedy the effects of racial discrimination in education, there are several concerns that should be considered by the administration and the Congress to ensure that the affirmative action remedy survives constitutional challenge. For simplicity of discussion, these will be examined in terms of affirmative action targeted on blacks. The discussion, however, would apply to remedies benefiting other minority groups as well.

1. *Findings and the Legislative Record*

In *Fullilove* the majority was perhaps excessively tolerant of a poor legislative record supporting the decision to enact an affirmative action remedy. It is not clear that the current Court would be equally tolerant, and it is clear that a better developed record would likely yield more effective remedial legislation.

The legislative record should include relevant information concerning inequality of opportunity in higher education today and the history of past discrimination creating that inequality.

This should include information concerning the intergenerational effects of educational inequality. To what extent, for example, is the current population of college students drawn from families in which parents are college graduates or are professionals? If parental education and professional status influence college enrollment, then past denial of educational opportunity can have a continuing effect on the achievement of equality today. Congress should inquire into how the effects of past discrimination manifest themselves in the potential pool of black college students. Congressional conclusions as to the continuing effects of past discrimination will determine the nature and scope of the remedy for those effects.

The undertaking of a thorough inquiry into the effects of past discrimination and their influence on equality in higher education today should not be an empty exercise designed only to satisfy some formalistic constitutional requirement.

Development of a complete legislative record is an educational process that can marshall political support for remedial affirmative action. Clearly establishing the record of past discrimination, and a continuing need for remedying its effects, also contributes to a belief that the affirmative action program is fundamentally fair and not simply the result of a political trade-off among interest groups. Faith in the fairness of a remedy makes burdens on the racial majority more tolerable. Perhaps most importantly, careful consideration of the need for remedial action contributes to the development of a more effective remedy.

2. *Duration of an Affirmative Action Remedy*

Judicial concern for the duration of affirmative action has focused primarily on the burden on innocent third parties. That concern is legitimate, both in terms of the constitutionality and political acceptability of affirmative action. The duration of the remedy, however, also implicates the issue of its effectiveness. Successfully remedying the legacy of racial discrimination is a delicate and difficult task. No remedy can be undertaken with full confidence that it will succeed or that its benefits will always outweigh its costs. Periodic evaluation of a remedy serves not only the dictates of the Constitution, but also considerations of sound policy.

Thus, legislation creating an affirmative action remedy should provide for regular evaluation and reporting to Congress. This function might be performed by the Office for Civil Rights in the Department of Education, a revitalized Commission on Civil Rights, or a presidentially appointed Commission on Equality in Education. Evaluation and reporting should include consideration of both the effectiveness of the legislative program in remedying the effects of discrimination and the impact of the program on third parties. Periodic evaluation by these means, and through legislative hearings, will provide Congress with the information it needs to decide whether the affirmative action remedy should be terminated, modified, or replaced.

3. *The Burden on Third Parties*

The affirmative action cases have generally viewed the displacement of third parties from benefits they have already acquired as an unacceptable result of affirmative action, but found the denial of a new benefit to be a more acceptable burden. This distinction, developed in the employment context, has led some members of the Court to accept affirmative action in hiring but reject it in the context of layoffs.

In *Wygant*, the plurality opinion extended the distinction into the context of college admissions. In dicta, Justice Powell distinguished between the denial of admission to some white students and the displacement of students who have already been admitted. In the former, the burden of an affirmative action program is diffused over the entire population of applicants and does not necessarily foreclose all opportunities for higher education.[35]

Further reduction of the burden could be accomplished through federal funding for affirmative action that is granted with the stipulation that it not displace existing expenditures by recipient institutions. To the extent that affirmative action takes the form of educational remediation, the burden on innocent whites can be reduced by ensuring that the programs are integrated and therefore available to both white and black students. The burden on innocent third parties can be further reduced by narrowing the class of beneficiaries for an affirmative action program.

4. *Increasing Victim Specificity.*

As suggested earlier, the affirmative action cases establish that victim specificity is not a constitutionally essential element of valid affirmative action. Nevertheless, several considerations support greater victim specificity where feasible. First, the more narrowly targeted the affirmative action program, the fewer the occasions for burdening innocent third parties. Second, the financial costs of affirmative action are reduced by narrow targeting. Third, a more carefully targeted program is more likely to reach those most in need of remedial action. Finally, if a racial classification is the sole means of targeting, the broad inclusion of nonvictim members of the targeted racial group may stigmatize the racial group. The concern is that broadly based affirmative action implies that even nonvictims in the racial group are unable to succeed without the racial preference.

To promote both judicial and political acceptance of an affirmative action program, further narrowing should be made within racial classifications where other characteristics indicative of victimization are available. Justice Harlan's opinion in *Gaston County* provides an appropriate means for determining when further narrowing would not unduly constrain the remedial powers of Congress: the characteristics used to narrow the class of beneficiaries should be "susceptible of speedy, objective, and incontrovertible determination" and should not significantly restrict the effectiveness of the remedy.[36]

In the context of affirmative action in higher education, the selection of additional characteristics to define subgroups of beneficiaries, within the victimized racial classes, will depend on the particular findings made by Congress and the particular remedies used. Several possibilities susceptible of speedy, objective and incontrovertible determination are available. Within the beneficiary class of black students, for example, the remedy could be more narrowly targeted by consideration of family income, segregation in pre-college schooling, education in resource-poor school districts, and/or parental educational level. Incorporating these or other techniques for tailoring an affirmative action remedy would reduce the burden on innocent third parties, protect against stigmatization, lower the financial cost of the remedy, and provide some assurance that the dollars spent are reaching those most suffering from the continuing effects of past discrimination.

Concurring in *Fullilove*, Justice Powell observed:

> In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race. . . . At least since the decision in *Brown v. Board of Education*, . . . the Court has been resolute in its dedication to the principle that the Constitution envisions a Nation where race is irrelevant. The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination.[37]

In the past decade, the Court has been somewhat ambiguous in its definition of the constitutional doctrine applicable to affirmative action remedies. Nevertheless, the restraint on congressional action to address the legacy of more than a century of educational inequality is more political than constitutional. What has been lacking in recent years is the political will to take the next, necessary steps toward racial equality. If a new administration, and the Congress, can muster the political will to enact a carefully crafted program of affirmative action in higher education, the Constitution presents no insurmountable barriers to its use.

CHAPTER VI

Minority Access to Higher Education

by John Silard

I. Introduction

Higher education was originally established in the United States for the advanced education of the few. In time, with the adoption of the Land Grant system and the opening of state colleges, it became recognized that there was a broad public interest in the availability of post-secondary schooling. Over the past forty years it has become clear that the earnings and employment opportunities once gained by the high school diploma now require a college degree. In an ever more complex and technological society, college graduation is a minimum requirement for pursuit of meaningful employment at adequately remunerated levels.

The modern day significance of higher education is symbolized by dramatic changes in the numbers of colleges and the students they enroll. The number of institutions has doubled over the past forty years[1] and their student population has grown from 2.4 million to 12 million.[2] The college enrollment rate of 18-24 year olds has risen from 11 percent to nearly 30 percent today.[3] It is also noteworthy that some eighty percent of college students attend public rather than private institutions.[4]

Minority group enrollment ratios in college should be viewed in the context of high school graduation differences. Only about 75 percent of our young people graduate from high school.[5] Black and Hispanic students drop out of school at greater rates than do whites--23 and 40 percent, compared with white dropout of 8 percent.[6] Among high school graduates, about half go on to enroll for some form of higher education either immediately or within a short period, and about half of those enrolled achieve graduation from a four-year college.[7] But minority group high school graduates are underparticipants--by factors as great as 4 to 1--in our higher education systems.

Thus, 1970s college enrollment data by race and national origin showed 36 percent of white males aged 18-19 enrolled but only 23 percent of blacks and 24 percent of Hispanics.[8] The comparable figures for females were 37 percent for whites, 27 percent for blacks and 21 percent among Spanish origin.[9] At ages 20-21 the college enrollment differences were even greater: white males 31 percent, black 23 percent, and Spanish origin 13 percent; for females the figures were 26 percent, 23 percent and 14 percent in minority enrollment was heavily concentrated in two year non-degree institutions.[10]

College completion rates for minorities were even more depressed than enrollment. Four-year college completion data for 25-29 year olds showed white males graduating at 28 percent, blacks at 12 percent, and Hispanics at 7 percent rates.[11] Such sharp disparities in college completion were duplicated for females, with whites completing at 22 percent, blacks at 12 percent and Hispanics at 6 percent. That economics explains most of minority group underparticipation in higher education does not, of course, negate the racial factor. While poverty causes minority underparticipation, the number of minorities in low-income groups is itself the result of historical discrimination by society. Slavery, followed by segregation and persistent discrimination, are at the root of minority-group economic distress. One result of that distress is that minorities earn college degrees at a fraction of the rate for majority-group students.

These minority participation disparities are largely a function of socio-economic differences; minority group students are clustered in low-income families, and their lower college participation rates reflect the generally far lower college participation of the poor.[12] Thus, in the college enrollment rate of black males, there is nearly a one to two difference between lowest and highest economic groupings.[13] Indeed, at low-income levels blacks are actually college-enrolled and graduate at a *greater* proportion than whites.[14]

The 1970s minorities college disadvantages continue today. For a period in the 1970s, gains were being made by minorities in college enrollment and completion. But between 1976 and 1985, in a shift the American Council on Education has found "alarming," there was a one-fourth *decline* in the rate of college entry by minority-group high school graduates.[15] Thus, in the 1980s there has been a turnback leaving unimproved the two-to-one and even four-to-one underparticipation rates. It appears that after a slight improvement, the rate of college enrollment by black high school graduates has again diminished, leaving a result no better than a decade ago. Reflecting 1970s gains, in 1981 the proportion of black high school graduates 18 to 24-years-old enrolled in college was 28 percent and for Hispanics it was 29.8 percent.[16] But by 1985 the rates had declined for both groups to 26 percent[17] compared to 34 percent for whites--a disparity not significantly different from a decade earlier.

Moreover, there is also no reduction in the severe graduation rate differences, which strongly reflect the overconcentration of minorities in community colleges that do not grant bachelor's degrees. Thus, in four-year colleges, where blacks were 8.5 percent of all students enrolled in 1978, they were only 6.2 percent of those who received degrees in 1981.[18] The college degree attainment of majority- and minority-groups among 1980 high school seniors showed whites earned degrees at a rate of 20.2 percent, blacks at 10 percent, and Hispanics at 6.8 percent.[19] These disparate ratios are similar to those a decade earlier--whites 23 percent, blacks 12 percent, and Hispanics 7 percent.[20] Such inequalities mean loss of college opportunity for vast numbers of minority youth; for each high school graduating class in the nation, minority-group college underparticipation deprives hundreds of thousands of black and Hispanic students.

There are significant deprivations in our society for the individual who does not attend college and earn a degree. The most obvious is in lifetime earnings. As already noted, the college degree today yields no more than the employment and earning power of the high school diploma of forty years ago. The baccalaureate opens doors to far better remunerated and more rewarding employment. A decade ago, the median income of males with only a high school education ($11,940) increased by some $4,000 per year ($16,673) for those with four years of college.[21] Currently the college degree has even greater earning power. In 1985 males aged 25-34, with four years of college, earned nearly $9,000 more per year than high school graduates; males aged 35-44 earned over $10,000 more; and those aged 45-54 earned $13,000 more annually.[22] A difference of thousands of dollars a year in earnings for college graduates becomes cumulatively significant over a lifetime.[23]

Minority-group high school graduates, who must forego higher education, lose not just in lifetime earnings but also in the quality of life and personal rewards of their work. It requires no documentation to demonstrate that there are limited personal rewards from the menial, clerical, and physical labor jobs that today remain open for noncollege graduates. The far greater range of occupations for which college graduates qualify represents an important lifetime value.

Finally, there are also personal benefits that flow from college education; difficult to quantify, they nevertheless mean an enriched life. Attending college appears to enhance intellectual development of the individual,[24] and to have a positive effect on family life, also benefiting spouses and children.[25] College education appears to facilitate the individual formation or strengthening of identity and the discovery of talents, interests, values, and aspirations.[26] College-educated individuals appear happier and more satisfied with jobs and family lives.[27]

There is thus loss of several kinds for the large number of minority-group young persons who forego higher education and its benefits. Are their losses inevitable and irreparable? The major causes and cures for minority underparticipation are the focus of the succeeding analysis. It is suggested that there are remedies available, through federal and state action, that could greatly reduce unequal minority opportunity in higher education.

First, I consider the underpreparation for college of minority students in elementary and high schools, calling for special recruitment and academic preparation measures in public schools and in community colleges. Second, I examine financial impediments to college participation for low-income minority group members.

I. Minority Underparticipation: Causes and Cures

Minority underparticipation in college is a "pipeline" phenomenon, reflected progressively in lower rates of entry, of four-year college enrollment, and of college graduation. Thus, the data indicates[28] that beginning with cohorts of 100 high school students, only 72 blacks, 55 Hispanics and 55 Puerto Ricans graduate from high school, compared with 83 white students; thereafter 29 blacks, 22 Hispanics, and 25 Puerto Ricans enroll in institutions of higher education, compared with 38 whites; ultimately only 12 blacks, 7 Hispanics, and 7 Puerto Ricans complete college, compared with 23 whites.[29]

These depressed rates of minority-group enrollment and graduation are rooted in the inadequacies and inequalities of our basic public education systems--much of the problem facing minority college students "occurs prior to higher education, at the elementary and secondary levels" and is beyond the control of higher education.[30] The factor that "best explains minority underrepresentation" in higher education fields "is the poor academic preparation that minority students receive at the pre-collegiate level".[31] "Practices that discriminate against the poor and minorities in elementary and secondary education produce a need for postsecondary programs that address the underpreparation of those who are disadvantaged . . . we need to examine and evaluate the present condition of elementary and secondary schools".[32]

Underpreparation of minority group lower-income children commences with earliest days, when they first arrive at school with measurable learning unreadiness, requiring prompt diagnostic and remedial resources. Learning unreadiness results from the deprivations of a poverty-level upbringing that limit capacities of speech and comprehension. Absence of instructional toys, books, and other learning tools; frequent disruption of attention and concentration in crowded living conditions, and absence of health care to correct learning-impairing conditions are among the burdens of ghetto life. Other factors are the absence of family role-models who have achieved educationally; the limitations of single-parenting; the inability of the parent to provide educational support (often because the parent may not have been educated).[33]

Such conditions mean learning unreadiness that requires extra school resources, yet minority children are usually denied the needed help. They are mostly concentrated either in poor rural districts operating with impoverished school budgets, or in districts in large cities beset by extra municipal and school costs that inhibit them from offering equal education. Inferior school quality is the lot of most of the nation's minority children, and thus the children with the *greatest* schooling needs are systematically the recipients of inferior public education. The result of this mismatch is that many minority children drop out of school, and many who do finish manifest lower self-esteem, lower scholastic ambition, and lack of college aspirations.[34] As recently observed:

> Minority high school students are likely to live in and attend school in poor districts were less money is spent for students; where teachers are the least experienced and sometimes the least prepared; and where guidance counselors are in scarce supply. Those black, Hispanic, and American Indian students who do persist through high school are less likely to be in a college preparatory program. They spend fewer years studying academic subjects, take fewer years of science and mathematics courses, and are less likely to take the SAT or ACT exams.[35]

Elimination of minority underparticipation in higher education would be most advanced by reforms in elementary and secondary schooling, affording disadvantaged children a better and more equal learning opportunity. But higher education equality for minorities cannot await public school reform. I propose in the following sections special recruitment and preparation programs targeted for the nation's high schools and community colleges.

A. Recruitment in High Schools

Colleges throughout the United States have used a variety of means to encourage elementary- and secondary-school students to prepare and apply for college enrollment. Although no overall analytical assessment has been made, many of these programs clearly appear successful in attracting minority and low-income students to a college program. In a recently published handbook the American Council on Education (ACE) lists successful programs at various college locations and identifies their principal components.[36] Innovative measures have been taken by some colleges for the same purposes. Syracuse University, for example, has a plan to guarantee admission to all eighth graders in the city who complete a designated program and meet specified standards.[37] Summer transition and enrichment programs are an increasingly utilized method to attract minority students, some as early as in the eighth grade; frequently these programs are at the college campus and familiarize students with what they might expect of a college environment and program.[38]

The largest effort to reach disadvantaged students with support for college aspirations has been operating for a quarter century with federal funds. Upward Bound is the Department of Education program that provides information, counseling, tutoring, and support to children in grades nine through twelve who meet the general eligibility requirements--family taxable income less than 150 percent of the poverty level, and neither parent a college graduate. The population of Upward Bound participants (and sister projects Talent Search, Special Projects, and Educational Opportunity Centers) is 41 percent black, 17 percent Hispanic, 4 percent American Indian, 3 percent Asian American, and 35 percent white.[39]

Federal grants for Upward Bound programs go to over four hundred operating organizations, at a current annual cost of some seventy million dollars, yielding over two thousand dollars for each participant's support. Usually operated by colleges on their campuses, Upward Bound provides special instruction in reading, writing, math, and other necessary college subjects, academic and financial counseling, tutorial services, information on postsecondary opportunities, as well as student financial assistance, help in completing college admission tests and applications, and exposure to a range of career options where disadvantaged persons may currently be underrepresented.

The purpose of this federal program is well served for the 30,000 students who can participate under current federal funding, for it appears to overcome minority-group disadvantage in college enrollment and graduation rates. Thus, a study by the Research Triangle Institute found 91 percent of Upward Bound graduates entering institutions of higher education, and found them twice as likely to enroll in four-year colleges as students of similar backgrounds who have not had the benefit of the Upward Bound program.[40]

Four years after high school graduation, Upward Bound graduates were found to be *four times as likely* to have earned a college degree as students of similar background who had not had Upward Bound help.[41] Recently, a study at the University of Maryland, of Upward Bound students five years after their college entry, found that 65 to 68 percent of them had received degrees or were still in college, as compared to only 40 to 44 percent of the general incoming college population, and only 27 percent of a group similar in socioeconomic background to the Upward Bound students.[42] These remarkable statistics are matched by a recent study of college retention funded by the Department of Education and conducted by the Systems Development Corporation. It established that college freshman who had received the counseling, tutoring, and basic skills instructions associated with Upward Bound and its sister programs, were 2.6 percent more likely to complete their first year of college as the other students enrolled in the same schools.[43]

The Upward Bound program, now a quarter century in operation, has been closely monitored for cost and efficiency. Its remarkable success, under the aegis of hundreds of participating colleges, suggests that the time has come for a major expansion of the program beyond the limited number of disadvantaged students who now enjoy its benefits. The population of needy young persons who could qualify for Upward Bound support, under the present eligibility standards, is at least ten times as large as the 30,000 current participants. Without suggesting that Upward Bound be universalized, it nevertheless seems appropriate to suggest a ten-fold increase in its federal funding. At a cost of $700 million a year, some 300,000 young persons--many from minority backgrounds--could have the benefits of a program that has proved educationally so effective in opening the college door for minorities.

B. Recruitment in Community Colleges

Throughout the nation, minority college students are enrolled in disproportionate numbers in community colleges, few of whom go on to four-year degree programs. Obstacles to transfer of community college students to the baccalaureate program are found in a variety of transfer limitations, and curriculum mismatches between two- and four-year public colleges. They largely reflect elitism of the senior institutions, making them at best indifferent, and at worst hostile to reforms that would encourage minority students from community colleges to transfer up to the four-year institutions.

The elitist attitude at the degree-granting colleges reflects, in part, the reality that, as currently constituted, they are superior in funding and in the scope and quality of their offering. One measure of their quality is the fact that state universities spend some 60 percent more per student than do two-year state colleges.[44] Similarly, they spend 50 percent more per student on libraries than do two-year colleges, and in funded research they spend 150 times as much per student.[45] Taking salary as one measure of faculty quality, average faculty pay at public universities is 38 percent higher than at community colleges.[46]

A recent study concluded that "university administrators and faculty saw community colleges as overly protective" and "injurious to transfer students who needed to be self-directed and self-disciplined in order to succeed in the university environment."[47] They saw community college faculty as offering "watered-down courses" lacking in scope and depth,[48] voiced the feeling that the quality of community college students is too low, and challenged grading practices at community colleges.[49]

Given these sentiments, it is not surprising that student transfer rates from community colleges remain so low. As one study commission recently reported, transfer processes between institutions remain erratic or nonexistent:

> Coordinated curricula and equivalent competencies between college and university courses remain exceptions, not the rule. University course equivalencies, requirements, and support services remain arcane mysteries to 'junior level' community college transfers because many baccalaureate degree granting institutions focus orientation programs on their freshman students.[50]

The recommendation most often voiced for reform, calls for improved interaction between universities and community colleges. Suggested measures include "clear-cut statements on transfer policy, visits by program representatives to improve advising for potential majors, closer working relationships between university counselors and their community college counterparts, faculty exchanges, and direct and continuing feedback on the performance of transfer students."[51] Faculty exchanges have been widely identified as the "most promising strategy for reducing transfer barriers."[52] Reflecting the need to enhance minority-student transfers it has been suggested that two- and four-year schools should "work closely together to provide opportunities for trouble-free transfer. This objective can be promoted through defining institutional mission in ways that limit competition, and through establishing explicit responsibilities for cooperation".[53]

Minority students at community colleges have shown a desire for post-high school education, but they are inhibited from upward mobility by transfer barriers that result from ways that states have defined and structured their two- and four-year college programs. Enlargement of opportunity for minority students to transfer to schools granting degrees, calls for reforms in state higher-education systems. Lowering the barriers will require changes in school programs, course content, admissions tests, and the like. Given the demonstrated resistance of four-year institutions, eased transfer will likely require intervention of the state's highest public officers, and school officials, to assure improved interaction between sister institutions.

C. Improved Financial Assistance

An additional impediment to equal higher education participation for minority groups arises from the costs of college, particularly burdensome to the low-income families among whom minority groups are highly concentrated. Data from a National Longitudinal Study in the 1970s showed that costs were the most significant reason black students gave for foregoing college entry or for withdrawing after enrollment.[54] Forty-five percent of black students and 40 percent of low-income students listed costs as the prohibitive factor in their decision not to apply to college--as compared to 32 percent of whites and 30 percent of high income students.[55] And, 41.17 percent of the black students gave costs as their chief reason for withdrawing from college.[56]

Since these data were published there has been no improvement, for college costs have increased. In the 1980s college tuition has grown by 9.8 percent a year, twice the inflation rate (4.9 percent), and substantially faster than income growth (6.5 percent). At public colleges, where most students are enrolled and where minorities are heavily concentrated, from 1980 to 1987 the four-year schools' tuition and fees increases have been at an annual rate of 10 percent.[57] As a result, the average annual cost to attend a public four-year institution, (including tuition and fees, room and board, transportation, and expenses), is now $5,789.[58] An annual college expense of nearly six thousand dollars is entirely beyond the reach of minority-group families who depend for an entire year on a $10,000 income, and it is also beyond the reach of lower-income families generally.

That the poor might not be able to have the benefit of higher education in the United States, was the concern reflected in the federal adoption in 1972 of the Pell Grants system of direct need-based financial aid for college students. College students from poor families have been greatly dependent on Pell awards. Thus at one group of colleges, statistics show that low-income students depend largely on Pell Grants, with 99 percent of those from families earning annually less than $10,000 receiving aid.[59] The recipients use the awards to cover 50.7 percent of their total school costs.[60]

Pell Grant reductions have been severe in the Reagan era and have most affected the poor and minorities. Thus, between 1975 and 1985, Pell

Grant aid in constant dollars declined by 62 percent.[61] From the 1979 to the 1984 school years, the purchasing power of Pell Grants received by the students attending black colleges declined by 37.3 percent.[62] While the maximum Pell amount (reserved for poorest applicants) was increased substantially between 1976 and 1986, in inflation adjusted dollars it actually declined by almost 20 percent.[63] Measured against the rising costs of college, grant aid to students declined significantly. By 1982-83 the dollar value of the Pell Grant declined down to about 30 percent of student costs at public universities--one-third less than four years earlier.[64] With Pell grants now providing less than half of college costs for needy students, it is clear this federal program is not opening wide the doors of college opportunity for minorities and the poor, as it had once been hoped it would. As two scholars have recently concluded, the program has become "less effective over time as a means for providing access for college, as increased funding for the program has not resulted in larger awards in real terms for the lowest income students attending college".[65]

Nor has the federal college loan program championed by the Reagan administration filled the gap for the poor. On the contrary, it appears that it is the college hopes of the poor that have been most damaged by the shift over the past eight years from a poverty-specific and need-based Pell program to a middle-class oriented loan system. A low-income applicant, who receives even a maximum Pell Grant, now faces compelling need for a loan program to cover his costs. With Pell Grants only meeting between 30 percent and 50 percent of college costs, to yield a four-year college cost of some $24,000 a student at a public college will have to borrow thousands of dollars to complete his schooling. A $9,500 projection was recently made as the post- college debt burden of a low-income student who has to meet costs without the benefit of family resources.[66]

It is hardly surprising that an 18-year-old black high school graduate would be reluctant to borrow ten thousand dollars for college when that is the amount his family has in order to meet its expenses for an entire year. Thus, the "increasing emphasis on loans rather than grants" during the past years has been seen as adversely affecting "low-income students and thus many minorities in higher education".[67] That is also the conclusion of another observer who notes that, under the new federal policy of shift from grants to loans, whereas in 1975-76 college grant aid was 80 percent of total federal assistance by 1984-85 it had declined to 46 percent.[68] Similarly, whereas at black colleges federal school aid in 1979 had constituted 53 percent of all financial aid to students, it had dropped to 37 percent by 1984-85, while federal student loans had increased from 8 percent of financial assistance to 30 percent.[69]

The shift from direct aid to high-cost college loans has impacted most on minority and poverty students. As may be expected, lower-income students "are more influenced by trends in college prices than students from higher income groups . . . low-income students have to spend a higher proportion of their income on subsistence purchases and therefore have less available for educational expenses.[70] The shift from aid to loans may have affected the extent to which overall aid was a stimulus to low-income enrollment."[71] With the proportion of student aid in the form of grants now decreased from 77 to 50 percent of all federal and state aid, there is reason to believe that the relatively low participation rates of low-income students reflect at least in part the money barrier.[72]

A 1986 survey of nearly 300,000 college freshmen bears out these conclusions. Commenting on the survey results, study director Astin noted that "changes in federal aid eligibility regulations have contributed to a steady decline in the proportion of freshmen participating in the Pell Grant program and rapidly rising dependence on loans".[73] Astin notes the affects of the federal reductions "on the decisions of poor students to attend college." Associate Director Green similarly commented that "recent changes in federal aid eligibility seems to have affected the college-going decisions of large numbers of students from low- and middle-income families".[74]

In sum, in the 1980s there has been a simultaneous reduction in the value of federal education grants, rise of college tuition burdens, burgeoning of the federal loan program--which commits students to heavy debt after college, and sharp declines in college entry and graduation by minority and low-income students. Whatever are the virtues of the federal loan program for the middle class, for the poor it is by no means an adequate replacement for the grant concept so important to college participation for minority groups. I urge, at the federal level, that the Pell program be restored to its original force, and that grant maximums for low-income students be adequate to permit them to attend four-year colleges without the need to borrow money. At the state level, tuition fees are now becoming substantial considerations for the poor who do not have the funds to meet such costs. A sliding-scale tuition plan should be initiated at state college, with low-income students entitled to attend free of charge.

CHAPTER X

THE REAGAN RECORD: SEX DISCRIMINATION IN HIGHER EDUCATION

by Ellen Vargyas

I. The Problem

While women make up slightly more than one-half of all students enrolled in post-secondary education,[1] this equality is, in many ways, only superficial. Higher education still prepares women for very different futures than men, while women--both as students and employees--all too often face hostile and discriminatory treatment on college and university campuses.

The following examples demonstrate the extent of the problems still facing women in higher education:

1. Community and Junior Colleges

The many vocational and technical education programs, offered by junior and community colleges, and pursued by approximately two-thirds of their students, are extremely sex-segregated. Women are heavily concentrated in the traditionally female and low-wage areas of health services, nursing, and secretarial programs, while their male peers, overwhelmingly, predominate in the technical and mechanical programs which lead to far higher-paying jobs. For example, in 1985-1986, nearly one-quarter of all associate degrees granted to women were in health sciences and nearly 10 percent were in secretarial programs. In comparison, under 4 percent of degrees granted males were in health sciences, and less than 1 percent were in secretarial programs. At the same time, over 25 percent of associate degrees granted to men were in engineering technologies (mechanics, construction trades, etc.), while only 2 percent of women pursued such courses of study.[2]

2. Sexual Harassment

Sexual harassment is a serious problem on college and university campuses. Studies show that up to a quarter of female students and faculty have experienced some form of sexual harassment by someone in a position of power over them; that is, a supervisor, professor, or advisor, while about 10 percent have actually been physically harassed.[3] While not quantified, anecdotal evidence demonstrates significant problems with sexual harassment of colleagues by colleagues, students by other students, and teachers by students.[4]

3. *Date Rape*

At least as appalling is the phenomenon of "date rape" which is also very much a fact of campus life. Surveys have found that well over 10 percent of female students can expect to be raped by another student, or students, while they are in college.[5]

4. *Undergraduate and Graduate Education*

Women remain significantly underrepresented in scientific and technical programs. In 1985-1986, women constituted only one-third of the students in physical sciences and computer science programs, and less than one-sixth of engineering students.[6]

5. *Professional Education*

Nursing and education programs remain overwhelmingly female enclaves. At the same time, in 1986, women made up less than one-third of all students studying to be doctors and dentists, and less than two-fifths of all law students.[7]

6. *Employment*

Gender-discrimination in employment in higher education remains a serious problem. Male professors earn substantially more than female professors: 1987-1988 academic year average salaries for full professors were $48,060 for men, and $42,380 for women; for associate professors, $35,960 for men, and $33,300 for women; for assistant professors $30,280 for men, and $27,410 for women; for lecturers, $27,240 for men, and $23,730 for women; and for instructors $23,030 for men, and $21,320 for women.[8] Further, women grow notably scarcer as one escalates the tenure ranks. In 1985-1986, only 12 percent of full professors, 25 percent of associate professors, and 38 percent of assistant professors were women. However, 53 percent of instructors and 50 percent of lecturers were female.[9]

Female college and university administrators face similar problems. Only 10 percent of college and university presidents are women, and those few women presidents are paid significantly less then their male counterparts. Further, the median salaries of females occupying the four chief administrative positions (chief academic officer, business officer, development officer and student affairs officer) are between 15.2 percent and 27.9 percent less than their male counterparts. These salary differentials persist even when the study controls for years of service.[10]

7. *Financial Aid*

Women, on average, receive less financial aid from both federal and nonfederal grant, loan, and work-study programs.[11] In the 1986-1987 academic year, full-time undergraduate women received $274 less in total financial aid than similarly situated men. Also in 1986-1987, part-time male undergraduates received higher average grants and work-study awards although, ironically, female undergraduates took out higher loans on average.[12] Given the gender-gap in earnings, the enhanced burden on the women repaying these loans will be even greater.

Women also suffer in the award of more specialized scholarships. As discussed below, they receive less than one-third of the many millions of athletic scholarship dollars distributed annually by colleges and universities nationwide. In addition, because of the gender gap in SAT scores--a consistent sixty points in favor of males[13]--women lose out in the award of prestigious scholarships based on scores on that test. For example, for many years women have received only one-third of National Merit Scholarships, and they have received as little as one-quarter of New York State's elite Empire State Scholarships which make available $40 million annually to top New York State students.

8. Sports

Discrimination against women in college athletics is endemic. Although women are a majority of the college population nationwide, they have only 30 percent of athletic participation opportunities, a smaller share of the extremely valuable athletic scholarship funds and only a 15 to 20 percent share of resources.[14] Women also suffer discrimination on the employment side of college athletics. Nationwide, barely a handful of women run athletic programs, while less than half of women's teams and less than 1 percent of men's teams are coached by women.[15] For women who are working in the area, pay discrimination is a serious problem.

9. Health Care

Despite regulations to the contrary, many post-secondary institutions fail to provide health coverage for pregnancy and gynecological services although they provide full coverage for other health needs.[16] Further, under Title IX, women have no right to health coverage for abortions.

10. Child Care

It is self-evident that mothers of young children cannot pursue higher education without adequate and affordable care for their children. While there are no figures available regarding the specific child-care problems faced by mothers who either attend or would like to attend institutions of higher education, the lack of availability of child care generally is well-documented. The problems facing low-income families are particularly acute. For example, according to the U.S. General Accounting Office, about 60 percent of AFDC work program respondents were prevented from participating in work programs because of the lack of child care. And almost 35 percent of women working, or looking for part-time positions, said they would prefer longer hours if child care were available, according to the National Association of Working Women.[17]

11. Status

Women are more likely than men to be part-time students; they are also likely to be older than their male counterparts.[18]

II. The Governing Law

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* is the principal federal statute prohibiting sex discrimination in education. Also providing important rights to women in academia are Title VII, 42 U.S.C. § 2000e, the Equal Pay Act, 29 U.S.C. § 206(d), and Executive Order 11246, 42 U.S.C. § 2000e, note, while the Women's Education Equity Act, 20 U.S.C. §§ 3341 *et seq.*, provides funds and support for the promotion of sex equity in education.

A. Title IX

Modeled on the race and national origin discrimination provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, Title IX forbids sex-based discrimination "under any education program or activity receiving federal financial assistance."[19] The question of the scope of this provision, which governs Title IX's jurisdiction, has been exceedingly controversial over the past ten years. In *Grove City College v. Bell*, 465 U.S. 555 (1984), the Supreme Court gave a very narrow reading, limiting Title IX's coverage to those specific programs or activities within broader institutions which actually received federal dollars. With the Civil Rights Restoration Act, passed over President Reagan's veto on April 22, 1988, Congress reversed the decision in *Grove City*. Title IX now applies institutionwide to all educational institutions and systems of education which receive any federal financial assistance--the vast majority of primary and secondary schools, colleges and universities, and programs for vocational and professional education in the country. Title IX also applies to education programs run by noneducational institutions which receive any federal funds. Examples of this coverage include education programs in correctional institutions, health care institutions, unions, or businesses of any type which receive federal financial assistance. The Reagan administration's support of the *Grove City* decision and its opposition to the Civil Rights Restoration Act are dis cussed below under the section, "Reagan Administration Attempts to Change the Law."

Without regard to the jurisdictional questions, Title IX protects students, faculty, and staff from sex discrimination and extends to most areas of academic life.[20] More specifically, Title IX, *inter alia*: prohibits employment discrimination in education;[21] prohibits discrimination on the basis of pregnancy or marital status both in educational programs and in benefits including health plans;[22] requires gender equity in physical education and competitive athletics programs;[23] prohibits discrimination in the provision of student services;[24] and explicitly authorizes the use of affirmative action and other remedial remedies.[25]

Victims of sex discrimination in higher education may enforce their Title IX rights by bringing a private cause of action directly under the statute,[26] or, they may file an administrative complaint with any federal agency which has provided federal financial assistance to the discrimination entity. Each such agency is obligated to enforce Title IX, although the Department of Education, through its Office for Civil Rights (OCR) has, in practice, been the lead agency in Title IX enforcement. Indeed, a problem, as discussed below, has been the failure of many agencies to undertake their Title IX enforcement obligations in any meaningful fashion. Under the statute, the ultimate enforcement sanction is to cut off federal funds to institutions which violate its prohibitions, but in practice, this penalty has never been imposed.

B. Title VII

Title VII, which prohibits discrimination in employment on the basis of, *inter alia,* sex, applies to public and private institutions of higher education on the same terms as it does to all other employers. Employees of higher education institutions may vindicate their Title VII rights through the same enforcement apparatus available to other employees: a complaint filed with the Equal Employment Opportunity Commission (EEOC), and a private right of action upon the exhaustion of their administrative remedies. Further, as the result of agreements with OCR and the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), individual claims of employment discrimination under Title IX and Executive Order 11246 are referred to the EEOC for administrative review. "Pattern and Practice" or "class" complaints of discrimination, however, are retained by the respective agencies with which they are filed.

C. Executive Order 11246

Executive Order 11246, promulgated by President Johnson in 1965, is the most recent--and broadest--of a series of Executive Orders banning employment discrimination by federal contractors. In 1967, sex was added to race and national origin as an impermissible ground for discrimination by such contractors. The expansion of the Executive Order to include sex discrimination is of particular importance to women in higher education because of the extensive number of federal contracts entered into by these institutions. Enforcement of the Executive Order is in the hands of the Department of Labor's OFCCP. Unlike Title VII and Title IX where private causes of action have been clearly established, under the Executive Order administrative enforcement has been virtually the sole means of enforcement available.

D. Women's Educational Equity Act

Enacted in 1974, the Women's Educational Equity Act (WEEA) set up a grant program to provide funds to promote educational equity for women and girls, particularly those who suffer from multiple discrimination, bias or stereotyping, and to provide assistance to enable educational agencies and institutions to meet the requirements of Title IX. WEEA was funded to a level as high as $10 million in 1980; it has been reduced to a $2.95 million appropriation in fiscal year 1989. When originally enacted, WEEA established an advisory board on women's educational programs. Citing excessive politicization, of this and other advisory boards, by the Reagan administration through the appointment of idealogues with no substantive knowledge of the programs they were charged with "advising," Congress eliminated it in April of 1988, along with certain other such boards, as part of the Elementary and Secondary School Improvement Amendments.

III. Reagan Administration Attempts to Change the Law

The Reagan administration's broad assault on civil rights has included a concerted effort to remove or drastically limit federal protections for victims of sex discrimination in higher education. The administration repeatedly zeroed out WEEA in budget proposals;[27] undertook a concerted effort, championed at the highest political levels, to eliminate affirmative action requirements under Executive Order 11246;[28] and curtailed EEOC enforcement of Title VII.[29] But perhaps most devastating to women in higher education was the Reagan administration's multipronged assault on Title IX, the centerpiece of the federal guarantee of sex-equity in education. The administration waged a campaign of litigation to limit Title IX's jurisdiction, succeeding--for a time--in drastically limiting federal authority to remedy sex discrimination in education. Through its administrative policy-making apparatus, the administration improperly restricted the Title IX enforcement authority it clearly possessed, even under the Supreme Court's restricted reading of the statute. And predictably, the administration opposed legislative efforts to restore comprehensive Title IX coverage.

A. The *Grove City* Decision

The Reagan administration scored its major victory in its effort to curtail the reach of Title IX with the Supreme Court's decision in *Grove City College v. Bell,*. As discussed above, *Grove City* presented the key jurisdictional question of whether Title IX's prohibition against discrimination by "programs or activities" receiving federal financial assistance extends institutionwide throughout the entity receiving the assistance, or is limited to the narrowly drawn program or activity which receives the funds directly.[30]

When President Reagan took office, the predominant view favored institutionwide coverage. Most lower courts had taken this position,[31] and civil rights enforcement agencies in previous administrations had treated their authority as institutionwide. Indeed, under President Carter, the Department of Education charged Grove City College with a Title IX violation for its refusal to sign assurances that it would not discriminate, basing its jurisdiction over the entire college on Grove City's receipt of federal student financial aid.

But, by the time the case reached the Supreme Court, the Reagan administration had reversed the government's position. It argued before the Supreme Court that the Department of Education's jurisdiction was limited to discrimination in the college's student aid program because that was the only "program or activity" which received federal funds. The other party to the case, Grove City College, argued that no part of the school whatsoever was covered by Title IX. *Amici curiae* were forced to present the case for institutionwide coverage, the position which had initially been advocated by the government. On February 28, 1984, the Supreme Court adopted the Reagan position as it held that Title IX's prohibitions against sex discrimination were limited to the particular program or activity which actually received federal funds. In the case of *Grove City,* this included only the financial aid program.

B. The Impact of *Grove City*

The fallout of *Grove City* was immediate in both the judicial and administrative forums. In the courts, cases involving sex discrimination in college sports, sexual harassment of students, and employment discrimination against faculty and staff were dismissed because although the institutions at issue received federal funds--often in the many millions of dollars--the discrimination did not occur in a particular program which directly received the federal dollars.[32]

But the damage went far beyond the courts. The administration promptly used *Grove City* to decimate the already limited efforts of federal agencies to enforce Title IX. Without articulating a coherent policy construing *Grove City,* OCR immediately began narrowing and dismissing Title IX complaints. In many instances, OCR staff simply dismissed the complaint at issue without even looking for the federal funding which would give rise to jurisdiction. Within eight months of the *Grove City* decision, citing its newly circumscribed, program-specific jurisdiction, OCR had closed, suspended, or narrowed over sixty cases brought under the four civil rights statutes affected. Two-thirds of these complaints involved Title IX sex discrimination claims. They included charges of discrimination in physical education and intercollegiate athletics programs, sexual harassment, employment discrimination, and discriminatory health plans. In a number of these cases, OCR had previously found the existence of discrimination, only to decide post-*Grove City* that the discrimination did not violate the law.[33]

To halt erroneous OCR dismissals, a number of organizations and individuals joined to file *Association of University Women v. Department of Education,* C.A. No. 84-1881 (D.C. D.C.), in June of 1984. Plaintiffs charged that OCR's failure to issue policies addressing post-*Grove City* jurisdictional questions led to arbitrary and capricious handling of Title IX complaints in violation of the Administrative Procedure Act. OCR had not even been keeping track of complaints closed on *Grove City* grounds; in order to respond to plaintiffs' discovery requests it had to do so. While the litigation was pending, plaintiffs and defendants entered into an agreement whereby OCR would not dismiss complaints on jurisdictional grounds until it issued policies defining the jurisdiction conferred by different types of federal funding. OCR also agreed to review complaints which had previously been closed to see that they were consistent with these policies.[34]

Even though some of the dismissed complaints were reinstated as a result of the litigation, the administration continued its effort to construe *Grove City* and its enforcement authority as narrowly as possible. OCR's policy memoranda interpreting *Grove City* laid out a consistently narrow construction of program specificity for higher education, an interpretation from which it never strayed.[35] For example, OCR took the view that the receipt of work-study funds conferred jurisdiction only over the student financial aid office and not over the programs or activities which employed the students and directly benefited from their work.[36] Through a series of memoranda, OCR also gave an exceedingly restrictive reading of its jurisdiction over sex discrimination in health insurance plans.[37]

In addition, OCR used *Grove City* to circumscribe its compliance reviews. Prior to *Grove City*, OCR reviewed entire education institutions receiving federal funds for compliance with Title IX. After *Grove City*, compliance reviews, like the adjudication of complaints, conformed to program-specific constraints.

The result was a Swiss-cheese Title IX higher education enforcement program which had more holes than coverage.[38] A first-year medical student's complaint of sexual harassment went unaddressed because, while the medical school received federal funds, none were earmarked for education of first-year students or the particular department in which her harasser taught.[39] OCR dismissed another complaint involving sexual harassment for lack of jurisdiction, stating it would have proceeded with the investigation had the harassment occurred in a building built, or renovated, with federal funds.[40] Consistent with the policy memorandum discussed above, blatant discrimination in health plans on the basis of pregnancy became unreachable because college and university offices administering the plans did not directly receive federal funds.[41] And sports programs, with the possible exception of athletic scholarships, became completely immune from Title IX scrutiny, despite blatant and pervasive sex discrimination, because they did not receive direct federal financial assistance.[42]

Grove City and the administration's interpretation of it did more than just limit Title IX coverage. Tracing federal funds and connecting their use specifically to the alleged discrimination consumed valuable agency and complainant time, diverting scarce resources from the task of fighting discrimination. Further, an extremely damaging environment was created whereby educational institutions, through choices as to allocations of federal funds, could choose where they could discriminate without fear of sanction. If an institution knew it was vulnerable to a sex-discrimination claim in a particular department or program, it could protect itself by the simple expedient of diverting federal funds from that department or program.

C. Civil Rights Restoration Act

The administration's attack on Title IX did not end with the *Grove City* decision and its administrative interpretations of that decision. The administration actively fought Congressional efforts to reverse the full effects of *Grove City* through the passage of the Civil Rights Restoration Act. That Act makes explicit Congress's intent that the jurisdiction afforded by Title IX, Title VI, Section 504, and the Age Discrimination Act is institutionwide. The Civil Rights Restoration Act was supported by a broad civil rights coalition and initially sponsored by fifty-nine senators and seventy-one representatives. Nonetheless, attempts to defeat it, first, through limiting coverage and later through controversial amendments bearing no relation to the purpose of the legislation--a strategy which the administration actively supported--delayed its enactment for four long years. A most damaging amendment, which ultimately was adopted, removed the obligation of covered institutions to provide coverage for abortions in their health plans or health insurance programs. It was, however, softened considerably from an earlier version which would have removed Title IX's protections against discrimination from women who have had or seek abortions, or for complications of abortion.

Congress finally passed the Civil Rights Restoration Act early in 1988--with the abortion amendment--only to see it vetoed by President Reagan. On March 22, 1988, in one of the most important civil rights victories in recent years, Congress rallied to override President Reagan's veto. Title IX once again prohibits sex discrimination institutionwide in entities which receive federal funds.

IV. Failures of Enforcement

Quite apart from its concerted effort to dramatically curtail civil rights enforcement by changing the laws to limit its very authority to enforce, the Reagan administration also failed to process civil rights complaints in a timely fashion, to properly investigate them, and to appropriately refer them for enforcement when the administrative process failed to remedy the problem. The strategy was simple but effective: if complaints were lost in the bureaucracy, or simply pushed through without proper investigations and/or resolutions, a lack of meaningful enforcement would be assured. The Reagan administration employed this tactic in a variety of areas of civil rights enforcement, including sex discrimination in higher education.

One of the administration's first targets in this regard was the consent order which the Carter administration had entered into the landmark *Adams* and *WEAL* cases, *Adams v. Bell,* C.A. No. 3095-70 (D.C. D.C.), and *WEAL v. Bell,* C.A. No. 74-1720 [hereinafter *Adams* and *WEAL*]. These cases, initially filed during the Nixon years, challenged improper enforcement by OCR of Title IX, Title VI, and Section 504 of the Rehabilitation Act, and by OFCCP of Executive Order 11246. In 1977, the government agreed to a consent order requiring the prompt and effective investigation and disposition of administrative civil rights complaints and compliance reviews by these agencies through a series of mandated procedures commonly referred to as "time frames."

While the Carter administration accepted the order, serious compliance problems mushroomed almost immediately after the Reagan administration took office. Indeed, the noncompliance was so immediate, serious, and widespread, the plaintiffs moved--in April of 1981--to have the government held in contempt for its violations. While the Court did not grant this motion, it confirmed the existence of serious problems of noncompliance with unusually straightforward language:

> We do find . . . that the order has been violated in many important respects and we are not at all convinced that these violations will be taken care of and eventually eliminated without the coercive power of the court.[43]

The government, evidently having no interest in complying with the order and seriously enforcing the civil rights laws at issue, thereupon moved to vacate the order. The Court denied that motion, clearly recognizing that in the absence of the order, civil rights enforcement would be severely jeopardized:

> [I]f the government is left to its own devices, the manpower that would normally be devoted to this type of thing,. . . might be shunted off into other directions, will fade away and the substances of compliance will eventually go out the window.[44]

Nonetheless, the administration kept fighting its enforcement obligations. It took the case up to the D.C. Circuit Court of Appeals which remanded it for a consideration of a variety of technical jurisdictional questions, *Adams v. Bell* and *WEAL v. Bell,* 743 F.2d 42 (D.C. Cir. 1984), and then moved to dismiss the case on those grounds. The district court finally granted the government's motion, *Adams* and *WEAL* 675 F.Supp. 668 (December 11, 1987). The case is now back in the Court of Appeals on plaintiffs' appeal.

The Reagan administration's extensive efforts to get out from under the *Adams* and *WEAL* requirements become entirely understandable upon a review of the sorry enforcement record it was building from virtually the moment it took office. Throughout the protracted legal battle, the agencies had, to a substantial degree, ceased effective enforcement of the laws they were charged with overseeing.

Many of the problems surfaced first in OCR which, early on, instituted practices which seriously undermined Title IX enforcement. Complainants reported pressure from OCR to drop complaints, even before OCR had conducted an investigation. OCR investigations of institutions, triggered both by complaints and compliance reviews, became spotty, with investigators failing to conduct thorough reviews of the evidence.[45] Delays in handling complaints were endemic, and in a number of regions staff were directed to backdate documents so they would appear to meet the *Adams* and *WEAL* time frames.[46]

In 1985, the House Committee on Government Operations released a report documenting these and other extremely troubling OCR practices.[47] The Committee established that before even investigating a complainant's charges, OCR routinely used its "Early Complaint Resolution" (ECR) procedure to secure a settlement between the complainant and the school.[48] When such an agreement was reached, OCR issued a letter stating that the institution was in compliance with the law so long as it complied with the terms of the agreement.[49] Since OCR had done no investigation, it had no way of knowing if the negotiated agreement was adequate to remedy the complained of, unlawful discrimination. Further, OCR failed to monitor systematically these agreements for compliance, severely compounding the problem.[50]

As early as 1981, the Department of Justice expressed concerns about these ECR settlements on the grounds that OCR did not scrutinize the substance of ECR settlements to insure that they secured for victims of discrimination the protections and remedies afforded by the applicable statutes and regulations. Furthermore, the Justice Department pointed out that failure to scrutinize ECR agreements could compromise OCR's enforcement position and its litigation posture in future cases against other discriminating institutions.[51] Justice's suggestion that OCR monitor ECR agreements was never put into practice. In 1983, OCR's own Quality Assurance Staff (QAS) again criticized the agency's failure to monitor these agreements. That QAS limited its criticism to ECR agreements where an inconsistency with the law was apparent, even without any OCR factual investigation, is a measure of the extent to which the ECR process grossly undermined Title IX's effectiveness.[52]

Even where OCR investigated complaints, it was extremely reluctant to pursue appropriate remedies. The House Committee criticized OCR for accepting settlement agreements which did not fully address the discrimination that the staff found.[53] Indeed, the Committee found some instances where OCR officials had intervened to weaken settlements to which the discriminating schools had already agreed.[54] Further, OCR avoided important enforcement mechanisms available to it. OCR rarely referred cases to the Department of Justice for enforcement, or instituted proceedings to terminate a discriminating institution's funds, even after settlement negotiations had long broken down.[55] OCR did not even develop guidelines governing such enforcement procedures.[56]

The Reagan appointees running OCR similarly used other management decisions to limit substantially the agency's effectiveness. For example, the House Committee found that despite resource shortages--including insufficient staffing levels which contributed to the delays in processing complaints--OCR failed to spend about seven percent of its appropriated funds.[57] Further, QAS recommendations were repeatedly ignored; Assistant Secretary Singleton finally disbanded the quality control unit altogether in 1985, without replacing it with any other coherent internal monitoring system.[58] OCR officials in Washington also failed to monitor the efforts of regional offices. They stopped collecting information from the regional offices which would have enabled them to assess the effectiveness of regional activities, and avoided issuing written policies to guide regional staff.[59]

The Department of Education's Office for Civil Rights was not the only agency with responsibility for Title IX whose enforcement program the House Committee on Government Operations found wanting. In 1987, it issued a report criticizing the Office for Civil Rights of the Department of Health and Human Services (HHS); many of the problems found at HHS were identical to those at the Department of Education.[60] The Committee characterized HHS's civil rights investigations as "routinely. . . superficial and inadequate."[61] Complaints referred to the Washington office for resolution of legal or policy issues languished there for months and even years.[62] The Washington office refused to issue policies guiding regional staff.[63] And just as OCR at the Department of Education had done, OCR at HHS misused the settlement process to thwart enforcement of antidiscrimination laws by, *inter alia*, avoiding issuing formal findings of violations; neglecting to scrutinize the substance of agreements and monitor their implementation; approving settlements which did not remedy documented discrimination; and failing to initiate judicial or administrative enforcement proceedings when negotiations had failed.[64]

While the Departments of Education and Health and Human Services conducted seriously flawed enforcement efforts, they at least maintained some enforcement presence. To this date, of the many agencies which disburse federal funds, only these two departments, and the Departments of Energy and Agriculture, have issued final Title IX regulations.[65]

Finally, the Department of Justice's failure to fulfill its role in the Title IX enforcement scheme compounded the already documented failures of enforcement. Between 1981 and July of 1985, the Department of Education's OCR referred only twenty-four cases for enforcement to Justice, a significant problem in and of itself. However, by August of 1985, Justice had done nothing at all with regard to sixteen of these cases, and had returned five to OCR. Of the remaining three, two were settled by consent decree, and the other was the subject of a pending lawsuit at the time of the Committee Report.[66]

There were similar patterns of failures of enforcement at the agencies charged with administering Title VII and Executive Order 11246, both of which are also important to women in higher education. Two reports issued in the fall of 1988 compellingly detail the failures of the Reagan administration EEOC and OFCCP. In a report dated October 11, 1988, the General Accounting Office found serious lapses in the EEOC's treatment of discrimination complaints.[67] The GAO's extensive investigation revealed widespread closing of complaints with findings of no evidence of discrimination despite the lack of a full investigation. The GAO found that EEOC investigators often neglected to contact relevant witnesses, or verify the completeness and accuracy of evidence, particularly evidence supplied by employers. Staff also frequently failed to compare charging parties with similarly situated employees, even though such a comparison is necessary to determine the merits of the charge. The GAO attributed these problems--in large part--to administrative pressure on investigators to comply with numerical goals for processing complaints in conjunction with the lack of sufficient staff to properly process the complaints.

OFCCP has also come under fire. On September 28, 1988, the Department of Labor's Office of the Inspector General issued a report tellingly entitled

"OFCCP Needs to More Vigorously And Consistently Enforce Federal EEO Regulations."[68] The Inspector General found, by way of example, that OFCCP only rarely evaluates contractors for compliance with equal employment opportunity requirements who do not comply with reporting requirements. Compliance reviews have been limited in number and have not been targeted at contractors with the greatest potential for noncompliance. OFCCP reviews have neither identified nor remedied underutilization of protected group members. Enforcement has been inconsistent, and so untimely, that many cases have been closed without any action taken to remedy major violations.

The bottom line for Title IX, Title VII and Executive Order 11246 is clear. The Reagan administration "enforcement programs" are notable primarily for their failure to enforce. And the message to victims of discrimination is equally clear. The federal government is not there to help.

V. Emerging Issues and Challenges

As we look ahead to the post-Reagan years, there is clearly much to be done in the effort to eradicate sex discrimination from higher education. While the task is substantial, the structure is largely in place to enable the federal government to play a major role. The critical question which will confront the next administration is not whether it has the authority and means to fight for sex equity in academia. Rather, it is whether it will find the will to do so.

There are, of course, more specific issues and challenges which the next administration will face. These can be grouped into several clusters of issues.

First, and most basically, there must be adequate resources devoted to the task. At a minimum, this means adequate staff to meaningfully investigate, negotiate and conciliate complaints. It means legal resources to mount enforcement actions where the administrative process fails. It means resources for sophisticated data collection and analysis and for disseminating this information to the public. And it means that all agencies which disburse federal funds must carry out their Title IX enforcement obligations.

Second, there is a pressing challenge to address--and then enforce--the meaning of the broadly-drawn prohibitions in Title IX, Title VII, and Executive Order 11246, as they apply to many of the specific problems facing women. The law governing sex discrimination is still relatively new and the government has a key role to play to assure that it will be used to achieve equity for all, without regard to gender, in many areas to which little attention has been paid to date.

In many respects, the law has been fully developed and needs only to be applied broadly. For example, there is no excuse for tolerating the widespread--and well-documented--employment discrimination in higher education, for permitting colleges and universities to offer health plans which exclude pregnancy and gynecological services, for accepting the demonstrated sex-based differences in financial aid awards, or for failing to eradicate the cruel practice of sexual harassment. All of these forms of discrimination have been the subject of complaints and violate plainly-drawn statutory and/or regulatory prohibitions. Yet, all too few actual court cases have been brought, or enforcement actions mounted, to translate these legal principles into changed policies and practices on the part of colleges and universities.

Moreover, other forms of sex discrimination, also damaging to women in higher education, have not received any attention, to date, in the form of investigated complaints or compliance reviews. Examples include:

- The extreme and rigid sex segregation in technical and vocational programs in junior and community colleges;

- The persistent sex-based differentials in SAT scores as well as the scores of other standardized tests used in undergraduate, graduate, and professional schools for purposes of admissions, scholarships, and placement;

- The bottom-line need of low-income mothers of young children to have affordable and adequate child care in order to pursue their schooling; and

- The particular needs of the many older women returning to institutions of higher education.

Title IX, Title VII, and Executive Order 11246 provide an appropriate legal framework to eradicate these and other manifestations of sex discrimination. Existing administrative options and enforcement techniques, including regulations, policy directives and the adjudication of complaints and compliance reviews, provide the necessary tools to accomplish the task. The straightforward challenge is to use these laws and enforcement mechanisms to achieve sex equity in higher education.

Third, and finally, there is a challenge before both the new administration and the 101st Congress to make certain legislative changes which are necessary to fully protect women's rights in higher education. To begin with, the abortion amendment to the Civil Rights Restoration Act must be repealed. There can be no sex equity if women are not able to realize the full extent of their rights of reproductive freedom as guaranteed by the Constitution.

Additionally, certain of the exemptions from coverage which were built into Title IX, when it was enacted over fifteen years ago, are no longer acceptable in the principal federal statute prohibiting sex discrimination in education. For example, the broad admissions exemption currently in Title IX is unwarranted, as is the total exemption for military schools.

Finally, there is a need to strengthen Executive Order 11246, particularly in its enforcement mechanisms. By way of example, the clear establishment of a private right of action is important to protect individual rights.

IV. Recommendations

1. There must be public and vocal support for civil rights enforcement on the part of top administration officials.

2. Adequate resources must be devoted to assure aggressive enforcement of the civil rights laws. More specifically, the new administration must assure adequate staff and resources to: investigate, negotiate, and conciliate complaints; bring enforcement actions; and gather, analyze, and disseminate data.

3. The new administration must assure that all agencies and departments within the government fully carry out their civil rights enforcement obligations. For example, all agencies and departments must promulgate Title IX regulations, and put into place an enforcement program, while the Department of Justice must coordinate agency activities and mount an aggressive enforcement effort.

4. The new administration must effectively target compliance reviews, policy directives, and rulemaking activities to address not only violations of the law where enforcement activities have been undertaken in the past, and where enhanced efforts are needed, but also to include such major problem areas as: sex segregation in technical and vocational programs in junior and community colleges; sex-based differentials in scores in the SATs and other standardized tests used in higher education admissions; the availability of child care for students and potential students who are low-income mothers; and the particular needs of older women returning to higher education.

5. Working with the Congress, the new administration should act to amend the civil rights laws to: repeal the abortion amendment to the Civil Rights Restoration Act; narrow other exemptions from Title IX coverage; and, strengthen the Executive Order 11246, particularly in its enforcement mechanisms.

CHAPTER XI

Tests and Discrimination

by David L. Rose

I. The Problem.

A. One of the most pervasive but least understood facts in the field of equal opportunity law is the enormous disparity between the scores on standardized "ability" tests between whites, on the one hand, and blacks and hispanics on the other. For most standardized tests of "aptitude," "intelligence," or "cognitive ability," the mean score for blacks is approximately one standard deviation below that of the mean score for whites.[1] With this disparity, the average black score is in the bottom one-third of the white scores, and only 16 percent of the black scores are in the top one-half (50 percent) of the white scores, only 6 percent of the black scores are in the top 30 percent of the white scores, and only 1 percent of the black scores are in the top tenth (10 percent) of the white scores. [2]

Perhaps the gap between test scores on such tests for blacks and whites is best illustrated by reference to a recent article by an industrial psychologist who argues that ability (intelligence quotient or IQ) tests are the best predictors for job success.[3] Based upon the results of a test administered to a nationally representative sample, the author assumes that the median IQ score for blacks is 83.4, while for whites it is 101.8, reflecting a difference in performance of approximately one standard deviation. Based upon such results only 1.1 percent of the black population, but 23.0 percent of the white population, are intelligent enough to be selected as physicians or engineers; only 3.3 percent of the blacks, but 35.2 percent of the whites, are intelligent enough to be selected as secondary school teachers or real estate sales agents; and only 28.4 percent of the blacks but 74.5 percent of the whites are intelligent enough to be firefighters, police officers or electricians.[4] Thus, if IQ tests were the factor used in selection of applicants, a black applicant would have only 1/23d the chance of being selected for medical and engineering school, less than 1/10th the chance for being selected as a teacher or real estate agent, and less than 2/5ths the chance of being selected as a police officer, firefighter, or electrician as a white applicant.

The disparity between white, Hispanic, and American Indian scores is also large[5]; on most of the standardized tests, the mean score of Hispanics was about halfway between that of whites and blacks, so that the difference between whites and Hispanic scores and between white and American Indican scores is usually about one-half a standard deviation.

Standardized "ability" tests, of the kind described, are used widely in American society for a host of decisions affecting education and job opportunities. The use of such tests permeates selection for both undergraduate and graduate training, from the Scholastic Aptitude Test administered by the Educational Testing Service, concerning admission to undergraduate training, and the Graduate Record Examination and the law school and medical school aptitude tests, to the National Teacher Examination and the teacher certification examinations. Similar tests are administered by the armed services for admission to officer training, and for assignment within the services. And most civil service systems use such examinations for hiring, and sometimes for promotion. The practices of private employers vary widely, but standardized ability tests are the most commonly employed objective procedure in the private sector, as well. Moreover, the state employment agencies, under the direction of the United States Employment Service, use the General Aptitude Test Battery (GATB), a form of standardized "ability" test as a basis for eligibility for and/or rank in referrals to private and public employers.[6] In addition, many examinations for occupational and professional licenses are written multiple choice examinations which parallel "ability" tests in many respects.[7]

Recent experience in the field of teacher training and certification illustrates how severely such tests restrict the opportunities of blacks and other minorities. In state after state, the number and percentage of blacks enrolled in teacher training programs in colleges and universities has been cut by two-thirds, or more, as standardized tests have been adopted as a prerequisite for entry.

Because the "ability" tests are so widely used and commonly accepted, they would provide a perfect reason--or excuse--for the disproportionate screening of blacks and Hispanics out of jobs, if they could be used lawfully without regard for whether in fact there is evidence of validity of a particular test for a particular job.

B. Federal equal employment opportunity law prohibits use of selection procedures which have a discriminatory impact on the employment opportunities of blacks, Hispanics, or women, unless the selection procedure has been shown to be predictive of successful performance of the job, or otherwise required for the effective operation of the employer's enterprise. In *Griggs v. Duke Power Co.*,[8] the Supreme Court, in a unanimous decision by Chief Justice Burger, held that Title VII of the Civil Rights Act of 1964 prohibited not only purposeful discrimination, but also "practices, procedures, or tests, neutral on their face and even neutral in terms of intent" if they operate disproportionately to exclude blacks or other minorities, unless the employment practice is required by business necessity.[9] Written tests, and educational attainments, can not lawfully be used as a basis for hiring or promotion if they have a disproportionate impact on grounds of race, sex, or national origin, and are not shown to be related to successful performance of the job.

The decision of the Supreme Court in *Griggs* was endorsed by the Congress in 1972, when it adopted the Equal Employment Opportunity Act of 1972 to strengthen Title VII. The committee reports in both the House of Representatives and the Senate endorsed the decision, generally and specifically, as it related to professionally developed tests; and the committee reports reflected the Congressional intent that the benefits of the *Griggs* decision should be extended to all applicants for employment and to employment in state and local governments and the federal government.[10]

One of the leading commentors on federal equal employment opportunity law has stated that the effectiveness of that law is tied directly to the Supreme Court's decision in *Griggs*, and that *Griggs* is second only to *Brown v. Board of Education* in terms of its momentous consequences.[11] However that may be, I believe that most scholars and practitioners agree that *Griggs* was the single most important decision interpreting Title VII; and that its importance lay in interpreting the Act to prohibit not only purposeful discrimination, but also unnecessary practices which have a discriminatory effect.[12]

The federal enforcement agencies, in their guidelines and regulations, had, prior to 1971, adopted the broad reading of Title VII endorsed by the Court in *Griggs*. After that decision, and a six-year interagency effort (from 1972 through 1978), the four agencies having primary responsibility for enforcement of the Act jointly promulgated the Uniform Guidelines on Employee Selection Procedures in 1978, so that the federal government would speak with one voice on the subject of what the standards were for the lawful use of tests and other selection procedures in the employment contest.[13] The Uniform Guidelines however were adopted as regulations by the Secretary of Labor under E.O. 11246, and, as such, are binding upon federal contractors and subcontractors. Similarly, they are binding upon the federal government as an employer under the regulations of the Civil Service Commission and its successor, the Office of Personnel Management.

The American Psychological Association, acting through its Committee on Psychological Tests and Assessment, found a high degree of consistency between the Uniform Guidelines and the Association's "Standards for Educational and Psychological Tests," and after further clarification of the Guidelines by the publication of Questions and Answers, found consistency in all areas where comparisons can be made.14 Thus, the Uniform Guidelines are consistent with the standards of the profession of industrial psychology.

While neither industry nor the labor unions applauded the Uniform Guidelines, neither seriously disputed their thrust, or sought to make basic changes in them. The courts continued to rely upon them, unless shown some cogent reason not to do so.

C. The Uniform Guidelines were listed for study and possible revision by the president's task force on the reduction of paperwork in the summer of 1981, and the chairman of the EEOC repeatedly stated, thereafter, that major revisions in the Guidelines would be made. In fact, no substantive changes in the Guidelines have been made or even published for comment since their issuance.

While the structure of the law remained unchanged during the Reagan administration, the discriminatory impact side of Title VII remained largely unenforced by the federal government since 1981. The best information available to me indicates there was only one lawsuit filed by the Equal Employment Opportunity Commission since 1981 which was based upon the improper use of tests or other aspects of the discriminatory impact branch of Title VII. That suit was filed on May 16, 1983.[15] No other EEOC suit challenging the testing practices of an employer or labor union has been filed under Title VII in the five and one-half years since that time. Given that EEOC has over three hundred lawyers, and files from three to six hundred suits a year, that failure to bring suit can hardly have been an accident.

While the enforcement program of the Department of Labor under E.O. 11246 is more difficult to monitor, I am not aware of any significant testing cases initiated by that Department since 1981.

The Department of Justice continued to institute and prosecute a number of lawsuits, from 1981 through 1988, which were based in whole or in part upon the unlawful use of tests or other selection procedures. However, the Department's staff devoted to equal employment opportunity is small (approximately thirty lawyers nationwide), and its jurisdiction under Title VII is limited to suits against state and local governments. Moreover, most of the suits involving testing were resolved prior to trial, and did not have a significant precedential impact.

The posture taken by the Department of Justice since 1982 in litigation at the appellate level, and particularly in the Supreme Court, has been to give the narrowest possible construction to *Griggs*, and to ignore the Uniform Guidelines, or to explain away or ignore any inconsistency between the position advocated and the Guidelines. For example, in the *amicus* brief filed by the Solicitor General on behalf of the United States and the Equal Employment Opportunity Commission in *Watson v. Fort Worth Bank and Trust*,[16] the government argued that the *Griggs* principle should not be applied to "subjective" employment decisions. The government argued that the application of *Griggs* to subjective practices would leave the employer with little choice but to engage in the use of quotas and reverse discrimination, because subjective practices cannot be validated.[17] In so doing, the government brief denigrated the arguments of the American Psychological Association and ignored the literature and court decisions showing that such practices are capable of validation. The government brief argued further that the Uniform Guidelines do not require that all subjective practices be validated.[18] While that statement is literally true, that the Guidelines treat subjective procedures no differently than objective ones, and provide for use of a procedure without valida tion only when use of such a procedure is required as a matter of business necessity.[19]

While the Supreme Court in *Watson* unanimously rejected the Government's position that *Griggs* does not apply to "subjective" selection procedures, the Court did so without a majority opinion.[20] A plurality of four (per Justice O'Connor) wrote an opinion which went to great lengths to address the concerns raised by the government, and to show that the Court's ruling should not cause employers to adopt quotas or to engage in preferential treatment.[21] In so doing, that opinion reopened or raised several important issues concerning the application of *Griggs* which most courts and commentators had believed settled long ago, and which are covered by the Uniform Guidelines. Chief among the issues is whether the employer bears the burden of persuasion as well as the burden of production once the discriminatory impact of the selection procedure has been shown.[22] In another *amicus* brief filed this term, the solicitor general has taken the position that the plaintiff has the burden of persuasion on the issue of the validity of a test shown to have a discriminatory impact.[23] This position is taken although the Uniform Guidelines state expressly state that the test "user" (the employer, labor organization, or employment agency) may rely upon any of the three commonly accepted methods of showing validity, or where that is not feasible, the "user should either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accordance with Federal law."[24] The introduction to the Guidelines states that:

> As previously noted the employer can modify or eliminate the procedure which produces the adverse impact. If the employer does not do that, then it must justify the use of the procedure on the grounds of business necessity. This normally means that it must show a clear relation between performance on the selection procedure and performance on the job. In the language of industrial psychology, the employer must validate the selection procedure.[25]

The Government's brief does not discuss the Guidelines when addressing the burden of proof question.

II. Recommendations

The primary recommendation in the field of testing is akin to that in other matters involving equal employment opportunity law. The President should direct the enforcement agencies to enforce the law (including lawful regulations and guidelines) as it now stands, and to make administrative changes only after notice and opportunity for comment. In particular, the EEOC and Labor should be directed to apply the law to discriminatory impact cases as well as to cases of purposeful discrimination.

One useful initiative taken in the recent past by the Department of Justice has been to encourage the cooperative validation of a standardized test for police officers. This study was based upon standardized tests used by major employers which include a portion based upon biographical data, and which has been shown in the private sector and in the military to have less adverse impact than the standardized "ability" or IQ tests discussed above, but to have as much or more validity. While the results are as yet incomplete, they are encouraging, and may provide an alternative strategy for the testing of candidates for teacher training and certification. We believe that government encouragement of such cooperative ventures in the field of teacher training and certification, and in other major occupations, may help to provide a long term resolution of the tension between equal employment opportunity and the use of objective tests which has caused much litigation and controversy in the last twenty years.

CHAPTER XII

IMMIGRATION-RELATED DISCRIMINATION: ENFORCEMENT IN THE WAKE OF IRCA

by Jonathan Abram

I. Introduction

Historically, newly-arrived immigrants in the United States have occupied the lowest rung of the economic ladder and, for lack of knowledge about their new country, have been vulnerable to abuses by employers, providers of housing, and others. That is all the more true with Congress's decision in 1986 to make it unlawful--for the first time in history--for employers to hire or employ undocumented or "unauthorized" aliens. With the enactment of the "employer sanctions" provisions in the Immigration Reform and Control Act (IRCA), Congress sought to stem the influx of undocumented aliens, by making jobs unavailable to those who enter the United States illegally.

At the same time, Congress risked aggravating the problems that have historically faced new immigrants: to avoid the newly imposed sanctions, employers might discriminate against lawful workers who look or sound "foreign" or have foreign-sounding names. Recognizing this risk, Congress included in IRCA a specific provision prohibiting employers from discriminating against applicants or employees based on their national origin or citizenship status.

The risk that IRCA's employer sanctions provision would aggravate discrimination against those who appear foreign was real in 1986, and has been borne out by documented experience since then. That is so because of the natural tendency of employers to overreact to avoid the risk of sanctions, and because of wholly inadequate efforts to educate employers about their obligations under the new law. After reviewing the two studies available to date, both of which indicate substantial discrimination due to fear of sanctions, this paper recommends that future sanctions enforcement efforts and educational outreach be geared toward informing employers that their obligations under the new law are simple and do *not* require special scrutiny of applicants or employees who *appear* foreign. In addition, the paper recommends that enforcement efforts directed at citizenship discrimination be reinforced and publicized to send the same message another way: persons authorized to work in the United States are not to suffer because of the national effort to exclude undocumented aliens by denying them employment.

II. IRCA Prohibitions Against Immigration-related Discrimination and their Enforcement.

A. General Enforcement Responsibility.

IRCA prohibits discrimination against noncitizens as long as they are authorized to work in the United States. Thus, for the first time, it is against the law in the United States for employers to refuse to hire persons just because they are not citizens.[1] In addition, IRCA effectively extends existing legal prohibitions against national origin discrimination to small employers (those with as few as four employees), who would otherwise have been beyond the reach of Title VII of the Civil Rights Act of 1964.[2]

In addition to these substantive prohibitions, IRCA created a new enforcement arm within the Department of Justice, the Office of the Special Counsel for Immigration-Related Unfair Employment Practices (Office of Special Counsel or OSC), to investigate and litigate complaints of "immigration-related" discrimination. Since the Special Counsel was finally nominated by the Reagan administration in June 1987, and confirmed by the Senate shortly thereafter, the Office of Special Counsel has been primarily responsible for enforcing IRCA's antidiscrimination provision. Secondary responsibility lies with the Equal Employment Opportunity Commission, which continues to enforce the parallel prohibition against national origin discrimination in Title VII.

The Office of Special Counsel enforces IRCA's antidiscrimination provision according to procedures that are much the same as those by which the EEOC enforces Title VII. Charges of discrimination are filed with the OSC,[3] which undertakes an initial review to determine whether the charge is "complete," and then investigates the charge to determine whether there is reasonable ground to believe the allegation of discrimination. If it concludes that the allegation is true, the OSC will attempt to resolve the matter, without litigation, by persuading the employer to reinstate or hire the person who filed the charge, to pay that person proper back pay, and to agree to comply with IRCA in the future.

Failing settlement of that kind, the OSC will file a complaint against the employer. Unlike Title VII, which authorizes the EEOC to litigate charges in federal court, IRCA provides an administrative forum for adjudicating complaints of immigration-related discrimination. Thus, when the OSC finds cause to believe a charge is true and is unable to settle it with the employer, it files a complaint against the employer with a specially designated Administrative Law Judge. The employer responds, and an administrative hearing is held. If the A.L.J. finds the charge true, the employers may be ordered to comply with IRCA in the future and to pay civil penalties, back pay, and attorney's fees.

B. Education of Employers.

The OSC also has responsibility, in conjunction with the Immigration and Naturalization Service (INS), to educate employers around the country about their responsibilities under IRCA. First, INS has attempted through meetings and printed material to inform employers that IRCA's employer sanctions provision requires only that they verify an applicant's identity and eligibility to work in the United States by reviewing one or two documents, as specified in regulations under IRCA, and that they complete a form (the I-9) certifying that such documents were reviewed.

Second, the OSC has taken responsibility for ensuring that sufficient efforts are made to inform employers of their correlative obligation under IRCA's antidiscrimination provision not to discriminate against foreign-appearing persons for the sake of complying with IRCA's employer sanctions provision. The sufficiency of these efforts is the subject of Section IV, below.

III. The Developing Problem of Widespread Discrimination Against Foreign-appearing Persons in the Wake of IRCA

The discrimination that Congress feared would arise from the imposition of employer sanctions has become a reality. That is confirmed by two recent studies, one performed by the New York State Inter-Agency Task Force on Immigration Affairs, established by Governor Mario M. Cuomo, and chaired by Cesar A. Perales, Commissioner of New York's Department of Social Services (the New York Study), and the other performed by the General Accounting Office (the GAO Study), as required by IRCA itself. The most significant finding confirmed in both studies is that employers are widely ignorant about their obligations under the employer sanctions provision, and have therefore taken steps to avoid sanctions that run afoul of the prohibition against discrimination.

A. The New York Study.

Based on self-descriptive responses to a survey of employers, the New York Task Force's November 1988 Study did not find a widespread incidence of the most egregious form of IRCA-related discrimination--very few employers admitted outright refusal to hire persons because they appear foreign.[4] The New York Study did establish, however, that a large percentage of employers fear sanctions, but are ignorant about how properly to avoid them: (1) Over 87 percent of employers (representing 94.4 percent of all jobs) are aware that they face fines under IRCA, but (2) fully 17 percent of these have no idea what to do to avoid them, and (3) 20.5 percent know they are required to review documents, but do not know what documents are satisfactory.[5] With widespread fear of sanctions and almost equally widespread ignorance about how to avoid them, IRCA creates the serious risk that employment will be denied persons who can present legally satisfactory documentation but who sound alarm bells, by appearing foreign, or by having foreign-sounding names.

The New York Study also documents substantial risk that applicants will be denied employment (or that their employment will be postponed) because employers refuse to hire persons until documents they deem satisfactory are presented by the applicant. Although IRCA specifically provides a grace period in which to provide documents, some 73 percent of employers require full documentation before the first day of work, and 12.5 percent were willing to admit that they had refused to hire applicants because they could not gather documents fast enough.

The New York Study's major theme was that ignorance about IRCA's requirements has resulted in substantial discrimination:

> We found those forms of discrimination which result from ignorance of acceptable practice, from efforts to expedite hiring or reduce hiring related expense, or from problems related to recognition of work authorizing documentation.

B. The GAO Study.

Although its stated conclusions differ from those of the New York Study, GAO's second annual analysis of the impact of employer sanctions revealed facts very similar to those documented in New York. When it enacted IRCA, Congress required that GAO conduct annual studies to determine (1) whether the employer sanctions provision is resulting in a "pattern of discrimination" (in which case, if the pattern is "widespread," the employer sanctions provision may sunset), or (2) whether it is resulting in "no significant discrimination" (in which case the antidiscrimination provision may sunset). After an initial report finding that it was too early to tell what effect the employer sanctions provision was having, the GAO issued its second report in November 1988.

The principal finding of the second GAO report was that of employers surveyed who knew of IRCA, one in six had begun selective screening, the unlawful practice of asking only foreign-looking or -sounding persons for employment verification documents or, worse, had begun to hire only United States citizens. This high incidence of unfair practices, the GAO found, was apparently the result of employers' fear of sanctions under the new law; some 85-89 percent of employers who indicated they had begun, or increased these practices, said they did so because of the threat of employer sanctions. Generally, the GAO found that employers who were unclear about IRCA's specific requirements (the I-9 form, etc.) were most likely to adopt these unlawful practices.

Although one in six employers admitted to adopting unlawful and discriminatory practices, and although it concluded that these practices were generally the result of sanctions (or uncertainty about the sanctions provision), the GAO nevertheless did not conclude that sanctions were causing a widespread pattern of discrimination, as defined in IRCA's sunset provisions. This was so because GAO lacked data sufficient to show how many of the victims of these discriminatory practices were, in fact, authorized to work in the United States.

In effect, just as Congress feared employers would be, the GAO was unable to distinguish between authorized and unauthorized workers in conducting its analysis, and so was unable to conclude that the discriminatory practices it found to exist were having the effect Congress specified in the sunset provisions.[6] Cautioning policymakers to "be concerned about employers who may have begun or increased these unfair practices," the GAO warned that methodological difficulties may prevent it (even in the third and critical report due in November 1989) from making any finding about the discriminatory effect of IRCA's employer sanctions. Nevertheless, the GAO did strongly recommend that further steps be taken to educate the nation's employers about IRCA's employer sanctions requirements, including the minimal document review required for all applicants, and about IRCA's antidiscrimination provision in general.

IV. Department of Justice Interpretation of IRCA's Antidiscrimination Provision

After IRCA was enacted, but before substantial data was available about the incidence or form of discrimination resulting from sanctions, the Department of Justice issued regulations designed to establish requirements for filing charges, procedures to be followed by the Office of Special Counsel, and other matters of administration. Although some early procedural rules were unworkable, these have generally been changed.[7] One possibly serious problem remains, however, that may hamper effective enforcement of the antidiscrimination provision.

The Department of Justice has taken the position that unlike those who file charges of discrimination with the EEOC under Title VII, persons who suffer discrimination covered by IRCA may not rely on the "disparate treatment" method of proving their case. For years, this method of proof has enabled Title VII plaintiffs to attack "facially neutral" employment policies that have demonstrable adverse effects on persons in a particular protected group, and that cannot be justified by business necessity.[8]

Although disparate impact analysis is well-settled under Title VII, and although its use has contributed substantially to Title VII's effectiveness in the last quarter century, the Justice Department took the position that disparate impact analysis could not be used under IRCA. To implement this view, the Justice Department included language in its regulations that construes the statute as requiring that discrimination be "knowing and intentional"--words that do not appear in the statute's description of permissible private charges of discrimination.[9]

Many regard the Justice Department's view as driven by ideology and not required by the language of IRCA, and at least one district court accepted disparate impact analysis in an IRCA case decided before the Department issued its final regulations.[10] Indeed, even the Department has stated that the disparate impact of a facially neutral policy--an "English-only" rule, in the Department's example--might prompt the Special Counsel to investigate the circumstances of such a rule's adoption.[11]

V. Implementation and Enforcement of IRCA'S Antidiscrimination Provision Since 1986

The major responsibility for enforcing IRCA's antidiscrimination provision, and for educating employers about its requirements, lies with the Office of Special Counsel. Based on data submitted directly by the OSC, and based on analysis of slightly earlier data done by the GAO, it is clear that the OSC's budget and resources are insufficient even to enable it to effectively investigate and prosecute charges of discrimination, much less to educate employers about their responsibilities under the new law.

As noted, the number of charges filed with the OSC to date have been small, perhaps due to lack of public awareness about the office and lack of field OSC offices outside Washington, D.C. As of October 31, 1988, the OSC had received 318 charges. Of these, 131 have been dismissed (generally, for lack of jurisdiction or on a finding of no reasonable cause to believe the charges true), and 35 have been settled (generally, with an agreement of the employer to cease its unlawful practices but without admission of violation).

Even though these numbers seem small, they exceed the projections made by the OSC for budgetary purposes--in fiscal 1988, for example, the OSC received approximately 60 percent more charges than it had projected--and the OSC has now revised its fiscal 1989 and 1990 projections dramatically upward, from 250 and 300 charges, to 500 and 700 charges, respectively. The OSC had an operating budget for fiscal 1988 of $2.345 million and 29 persons on staff, including 15 attorneys responsible for all complaint investigation and prosecution activities. According to the GAO Report, the average caseload per attorney is 20, and the Special Counsel reports that caseloads above 14 negatively affect the quality of investigations. Despite this current understaffing, the OSC's anticipated fiscal 1989 funding is $2.064 million, a 12 percent decline.

Because the OSC regards its primary mission as investigating and litigating charges of discrimination, this budget shortfall and understaffing will hit hardest in the area that both GAO and the New York Task Force agree is most critical to combating the discrimination that has arisen from employer sanctions--education of employers about

IRCA's requirements. To date, the OSC has taken some steps toward publicizing IRCA's prohibitions against discrimination, including issuing a brochure, *Immigration Reform and Control Act of 1986 (IRCA): Your Job and Your Rights*, and arranging INS-funded radio and television public service announcements about the Office of Special Counsel, featuring *L.A. Law's* Jimmy Smits. Despite these efforts--and others--taken by INS, both the New York and the GAO study show that a large percentage of employers do not understand their obligations under the employer sanctions provision and, as a result, have adopted or increased practices that directly violate the antidiscrimination provision.

VI. Conclusions and Recommendations

If the nation is to continue on its course of squeezing undocumented aliens economically by prohibiting employers from hiring them, it must devote the resources necessary to protect authorized workers (who appear foreign) from spill-over discrimination by employers ignorant of the law's requirements. In conjunction with the new and more responsive equal employment opportunities policy recommended by the Citizens' Commission elsewhere in its report, the Department of Justice should take several immediate steps through INS and the OSC to prevent INS's increasing enforcement of employer sanctions from causing the substantial discrimination that already appears from available data, and to assure effective remedies for that discrimination.

A. Employer Education.

All studies to date blame employer ignorance for the substantial incidence of unfair and discriminatory practices that have begun to emerge from employer sanctions. Dimly aware that the new law provides some punishment for hiring undocumented workers, employers take steps not required by the employer sanctions provisions to protect themselves from sanctions, and in the process run afoul of the antidiscrimination provision. Greater awareness of the fairly simple documentation requirements imposed by IRCA would prevent much of this abuse, and INS must therefore redouble its efforts to educate employers about the steps they are required to take to verify work authorization. This is all the more true as INS begins to enforce the employer sanctions provision with actual fines. Only when they are clear about what the law requires will employers cease taking steps prohibited by law.

B. Antidiscrimination Enforcement

In combination with efforts to educate employers about the requirements imposed by IRCA's employer sanctions provision, the OSC must take steps to make real the threat of sanction for unlawful discrimination. Fear of employer sanctions has now driven large numbers of employers to violate the antidiscrimination provision, and effective enforcement of that provision is necessary to show that sanctions also can result from going too far. Among the most obvious steps needed to promote effective enforcement of the antidiscrimination provision are:

1. Increasing the OSC's budget so that it can accomplish both its primary mission of effective enforcement and its critical second mission of educating the nation's employers about IRCA's prohibition against discrimination. Both are especially critical as the INS begins vigorous enforcement of the employer sanctions provision.

2. Establishing a regional presence for the OSC, either at field offices of its own, or in offices combined with those of the EEOC which has parallel enforcement responsibility. An enforcement arm with offices only in Washington, D.C. is destined to solve only a small part of the problem.

3. Finalizing a full Memorandum of Understanding between the EEOC and the OSC. The interim MOU provided only for a simple mechanism to handle charges filed with the wrong agency. Much more coordination is needed, both to establish a presence for the OSC around the country, and to provide procedures for joint investigations of immigration-related discrimination falling within both agencies' jurisdiction.

4. Working with GAO to ensure that before it conducts the analysis required for its critical third sunset report, it establishes surveying--or other accounting methods--that will at least make it possible for GAO to reach relevant conclusions about the incidence of sanctions-related discrimination against persons authorized to work in the United States.

CHAPTER XIII

Age Discrimination

by Burton Fretz and Donna Shea

I. Introduction

Congress enacted the Age Discrimination in Employment Act (ADEA) in 1967 to protect the employment of older workers.[1] However, during the 1980s, the occurrences of age discrimination in the workplace continued to increase, while the rights of older workers virtually went unprotected by the federal civil rights enforcement agencies.

The Equal employment Opportunity Commission (EEOC) administrative practices, and the litigation strategies during the past eight years have resulted in a lack of enforcement. The EEOC chose to channel its resources into individual cases, as opposed to cases that could have a broad impact. Claimants experienced extensive delays in charge processing, were denied information concerning the status of their cases and others they could join, and were encouraged to settle.

On new or important policy issues, the EEOC took a number of pro-employer actions which undermined, rather than supported, victims of discrimination. For example, the EEOC proposed rules to permit employers to request older employees to waive their rights and settle claims under the ADEA without EEOC supervision. The EEOC also consistently permitted employers to cut off traditional pension accruals, contributions, and credits for employees who work beyond age sixty-five, until Congress intervened to prohibit that policy.

A. Increasing Incidents of Age Discrimination in the Workforce

Age bias in the workplace continues to mushroom. In a recent four-year period, one million workers over fifty-five lost their jobs; over half from a job they had held for more than fifteen years. Among the same one million older workers, less than half became reemployed. Age bias persists through the prevalence of false stereotypes which tie diminishing skills to increased age, and which preclude business judgments based on an individual's ability. It also persists due to the increasing number of age-based decisions being made by employers. As industries merge or downsize, management concentrates on reducing the number of higher-salaried workers in order to cut labor costs. Because salary correlates closely with age, senior workers are more vulnerable than their younger counterparts.

The invidious effects of such discrimination are readily apparent. An individual's retirement is directly dependent on his/her employment security, yet employers are undercutting workers' pension benefits and savings. Pensions tend to vest, and to accrue benefits most rapidly, during a worker's advanced years of service. Similarly, persons save more as they approach retirement age. The termination of older workers undercuts their ability to accrue either pension benefits or savings at the maximum point of opportunity in their careers. The increasing number of age-based decisions have caused older people to become more aware of the legal remedies available to protect them and have caused an increase in the number of age discrimination complaints filed. Charges of age discrimination filed with federal and state authorities has grown 250 percent from 11,076 in 1980, to 25,549 in 1987.[2] During 1980, $26 million in back pay and related benefits was awarded to victims of age discrimination.

Because the financial future of older persons is increasingly volatile, and age-based discrimination is widespread, this paper examines EEOC enforcement of the ADEA. Its basic conclusion is that such enforcement must be a top priority of a new administration.

B. Federal Statutes which Prohibit Age Discrimination

1. The Age Discrimination Act (ADA) of 1975

The Age Discrimination Act of 1975,[3] prohibits age discrimination in services and benefits provided by programs receiving federal financial assistance. The Secretary of Health and Human Services has a primary responsibility to enforce this statute. The ADA, however, has virtually gone unenforced for the past eight years.

The Secretary of Health and Human Services is responsible for coordinating the implementation of the ADA by all federal agencies, and is mandated by the Act to issue governmentwide regulations, and then, to approve specific regulations in order to assure their uniformity.[4] After issuing strong governmentwide regulations in 1979, however, the secretary (in 1982) encouraged each agency to *weaken* its age regulations. As a result, recipients of federal funds no longer have to conduct a one-time self-evaluation of any age distinctions they use, or provide data concerning the ages of participants in the programs, thereby undermining efforts to monitor compliance with the statute.[5]

Many federal agencies have not enforced the ADA. Key agencies failed to propose regulations to implement the Act despite having a statutory mandate to do so since 1979. Two such agencies--the Departments of Education and Labor--oversee the education and training programs that are important to older individuals.

Each agency is also required to report annually to Congress on the Act's enforcement, including data on the ages of program participants. However, rather than investigate complaints of age discrimination, federal agencies have opted to turn them over to the Federal Mediation and Conciliation Service, where they ultimately turn stale.[6] And data concerning the age of participants in federally funded programs has never been reported to Congress.

2. The Age Discrimination in Employment Act (ADEA) of 1967

Congress enacted the Age Discrimination in Employment Act of 1967 in order to protect older workers.[7] The statement of purpose of the ADEA reads:

> . . . it is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.[8]

The Act protects people forty years, and older, from adverse employment decisions based on age, including hiring decisions, promotions, demotions, salaries, benefits, and terminations. It also requires that individuals be evaluated according to their abilities rather than their age or higher salaries that typically accompany seniority. The Act encourages employers to retain skilled, experienced, workers and to refrain from using pretextual rationales for age-based decisions. The law covers both public and private employers with twenty or more employees. Remedies are available to employees who have been discriminated against include: back pay, restoration of lost benefits, reinstatement, and front pay. Double damages can be awarded when employers have "willfully" violated the Act.[9]

In 1979, responsibility for enforcing ADEA was transferred from the Labor Department to the EEOC as part of a governmentwide reorganization which consolidated in one agency enforcement authority for all federal equal employment opportunity laws. The EEOC has the authority to issue policy statements and interpretations, investigate and conciliate charges, and file suits. Complaints alleging violations of ADEA must be filed with the EEOC. The EEOC oversees the investigation of every charge. It also uses its rulemaking authority to issue policy directives to guide employers in making nondiscriminatory employment decisions. The EEOC has not fulfilled its role as the primary agency responsible for enforcement of the ADEA.

II. Administrative Practices Which Have Weakened ADEA Enforcement

Much of the recent decline in ADEA enforcement is due to the EEOC's internal policies. Processing delays, litigation strategies, nondisclosure policies, budget and personnel practices, have all contributed to the EEOC's inefficiency.

A. Delays in Complaint Processing

The Commission has not efficiently processed complaints alleging unlawful age discrimination practices. The Commission recently allowed the statute of limitations to run in more than seventy-five hundred cases. Allowing the statute of limitations to expire in that many cases is particularly egregious because the victim's age necessitates either a quick resolution of the problem, or immediate alternatives in employment opportunities. The impact of EEOC's inaction was ameliorated when Congress enacted the Age Discrimination Claims Assistance Act in 1988.[10] Pursuant to that statute, claimants who otherwise were barred by the statute of limitations from pursuing their claims, now have until October 7, 1989 to file suit in federal court.

Other problems also plague the EEOC. Alluding to a report of the Senate Special Committee on Aging, the Commission has created undue delays in processing charges,[11] closed cases without full investigations,[12] and allowed the backlog of unsettled cases to increase.

The EEOC cannot fairly attribute delays in processing complaints, and the ever-increasing backlog, to staffing levels. While full-time equivalent employee levels remained virtually constant during fiscal years 1984-1987, the number of charges that remained unresolved at the time the statute of limitations expired, increased 300 percent. Even though the total number of charges received by the EEOC remained stable at seventy thousand, and even dipped to approximately sixty-five thousand in 1987, the backlog of unresolved cases increased 50 percent from fiscal year 1984 to fiscal year 1987.[13]

The financial and emotional impact on victims of discrimination, due to delays in the processing of complaints, are obvious. Many cases have been documented where individuals, assured by the Commission that their claims will be investigated, wait months--and sometimes years--while receiving little or no additional information from the EEOC concerning either procedural or substantive aspects of its investigation.[14]

B. Shift in enforcement policy from systemic to individual cases.

In 1985, Commission Chairman, Clarence Thomas, announced a shift in EEOC enforcement policy, from challenging systemic patterns and practices of discrimination to individual complaints. That decision channeled EEOC resources into cases which involve relatively small numbers of claimants, and which have a relatively slight impact on discrimination law. In contrast, pattern and practice cases--including class actions--often reveal more widespread discriminatory practices and provide remedies to a greater number of victims than do individual complaints. Although the EEOC apparently decided that pattern and practice litigation was too costly, such suits may in fact be the most cost-effective approach to resolving broad issues of ADEA interpretation. Individual cases enable the EEOC to focus on less complicated and quickly resolvable issues.

Theoretically, the new enforcement policy should have resulted in an increase in the number of cases brought by the Commission. However, just the opposite is true. EEOC case levels have not kept abreast with the 250 percent increase in discrimination complaints filed since 1980. Indeed, EEOC litigation to enforce ADEA has decreased. In 1987, the Commission filed eighty new ADEA cases, down 30 percent from 1986. It filed only twenty-four nominal "class" cases in 1987, down more than 60 percent from 1986. And, many of the cases it filed as class cases actually involve aggregations of several individual claims, the resolution of which will be limited to the facts of each case.[15]

A better measure of the EEOC's effectiveness is the number of complainants who obtain recompense for discrimination, rather than the number of cases filed. However, when measured against that standard, it is clear that the EEOC has been lax in fulfilling its responsibility to enforce employment opportunity laws. In the first half of 1985, only 2,964 persons were compensated through all EEOC cases, as opposed to 15,328 persons during the same period in 1980, a 500 percent decline.[16]

C. Pressures to Close or Settle Cases

Statistics from recent years also indicate that the Commission has adopted policies to avoid litigation and to pressure staff to resolve claims. For example, approximately two-thirds of one percent (.006) of ADEA charges filed in fiscal years 1984-1987 actually resulted in lawsuits filed by the EEOC. Moreover, the Commission's Performance Agreement for District Office Directors was amended in 1987 to provide for an average charge processing time of 150 days, half of its previous average.[17] Although a tight processing time for complaints is commendable, the standard fails to account for the longer investigation time required for changes that involve complicated facts, large corporations, and voluminous documents. In such major cases, District Directors exceed the processing deadline at their peril. It creates pressure to settle and close important cases, or, alternatively, to recommend litigation to the Commission without a complete investigation to support the charges.

D. Denial of Information to Charging Parties

The Commission follows two procedures which, if changed, would greatly assist complainants to pursue their cases without cost to the agency. Current Commission policy does not permit it to disclose to a complainant the position taken by the employer who is charged with a violation. Such a policy impairs the complainant's ability to assess the strength of his or her claim and to proceed with the case. No legitimate purpose is served by the nondisclosure practice.

Moreover, the EEOC refuses to notify potential class members of an existing ADEA lawsuit against the same party defendant or of their right to join the suit. The EEOC offers no justification for this refusal. As a result, a complainant is not informed about a lawsuit which may be easy and inexpensive to join, and is instead forced to initiate separate litigation and bear the costs individually. Additionally, a complainant who fails to file a timely complaint with the EEOC might still qualify to join a pending class action, but cannot do so because the EEOC refuses to advise complainants of the existence of such cases.

E. Budget Factors

Increased resources could certainly strengthen the EEOC enforcement program. However, prior efforts to increase its funding were thwarted because the Commission and Congress disagreed over the most effective use of current resources. For example, Chairman Thomas requested a $26 million increase for fiscal year 1988. The EEOC budget was increased by $13 million. In response, Thomas characterized the increase as a defeat and used it to justify staff cutbacks in significant areas including the Systemic Litigation Unit, which is responsible for pattern and practice cases against large and complex businesses, and litigation and travel line expenses, thereby impairing the enforcement efforts of attorneys in district offices.[18]

F. Personnel Practices

Obviously, effective enforcement programs are dependent on having sufficient staff. However, as a cost-saving measure, the EEOC downgraded area office investigators from typically GS-11 levels to GS-9. The practical effect was to lower the general knowledge and skill of the staff responsible for initially processing charges. Because experienced investigators do a greater amount of work more efficiently, the downgrading of investigators has had a detrimental impact on complaint processing time, quality of investigations, and volume.

Many of the EEOC management problems, including low morale and widespread job dissatisfaction, as well as delays in charge processing, may be due to the EEOC's "new and improved" Charge Data System. Commission Chairman Thomas concedes that the system does not work as well as it should. Indeed, district managers have stated publicly that the system is cumbersome and time-consuming, and that the software is insufficient for some daily, routine, office operations.[19] For example, there has been no way to flag cases which had been pending for so long that the statute of limitations period was about to run.

III. Changes in Regulatory Policy and Litigation Concerning ADEA Enforcement

A. Regulatory Actions

The Commission has broad regulatory power but it has been reluctant to issue policy statements responding to new challenges or problems arising under the ADEA. Instead, the EEOC relies on whatever patchwork of policy that emerges from judicial decisions or the increasing number of cases settled through conciliation. While resolution of individual complaints is laudable, the resulting impact on other victims of discrimination is limited. Policy set in this fashion does not have the same real effect on employer behavior that rulemaking does.

1. Pension Accruals

Among the most significant threats to older workers is the EEOC's consistent undermining of their rights to pension accruals. Since 1979, the EEOC has interpreted the Act to permit employers to cut off pension accruals, contributions, and financial credits for employees who work beyond the normal retirement age of sixty-five. In June 1984, the EEOC, acting on the advice of its general counsel, voted unanimously to rescind that interpretation because it was inconsistent with the Act.[20]

Following the Commission's vote, White House officials expressed disapproval of the proposed action in several meetings with at least three commissioners and the EEOC chief of staff.[21] Subsequently, the Commission dropped its proposed rule and simply continued its policy of allowing employers to terminate pension accruals for workers after age sixty-five. The EEOC refused to alter its policy until Congress amended the ADEA, as part of the Omnibus Budget Reconciliation Action of 1986, and explicitly prohibited employers from cutting off pension accruals, contributions, and credits for workers who reach age sixty-five.

Because that amendment was not to take effect until 1988, a suit by senior organizations in 1987 sought an immediate cessation of the EEOC's pension cut-off policy. A federal court ordered, *inter alia*, the EEOC to promulgate a new rule to assure protection for all workers until the new law could take effect. The EEOC did not fully comply with the court order, and appealed to overturn the portion of the court's order forcing it to promulgate a new affirmative rule until the new law took effect. The appeal was successful, based on the limited theory that courts must defer to an agency in rulemaking decisions.[22] As a result of the district court's decision, however, the EEOC did modify its policy to the limited extent of rescinding its previous written policy permitting cut-offs of pension accruals.

More recently, the Internal Revenue Service issued proposed regulations to implement the Omnibus Budget and Reconciliation Act of 1986 regarding the accrual of pension benefits past normal retirement age. The proposed regulations permit defined contribution plans (those in which the employer promises to allocate a set percentage of compensation each year toward the employee's pension) to limit the number of years of service for which an employee may receive allocations of employer contributions and forfeitures. However, neither the Omnibus Budget and Reconciliation Act nor the ADEA authorized such limits on years of service in defined contribution plans. Because the proposed rule allows employers to use years of service as a proxy for age, without justification in either law or business necessity, it should not be adopted.

2. *The Apprenticeship Exclusion*

The ADEA does not permit employers to discriminate in favor of younger workers in staffing apprenticeship training programs. However, the EEOC has carved out a blanket exemption for apprenticeship programs. In 1980, and again in 1984, the EEOC general counsel advised the Commission that this exception is legally insupportable, a conclusion shared by a federal district court in New York in a case to which the EEOC was not a party.[23] In response, EEOC did vote to eliminate the apprenticeship exception. However, the Office of Management and Budget opposed the change and the Commission ultimately dropped its proposal and continued the exception.[24]

3. *Waiver of Rights*

Prior to 1987, employers were not permitted to get employees to sign a waiver of rights or settle claims under the ADEA without seeking EEOC permission. However, in July 1987, the Commission adopted a final rule that permitted employers to obtain a waiver of rights, and to settle claims under the ADEA without its supervision. The EEOC, which adopted the rule without any supporting evidence, reasoned that the number of requests for supervision of waivers would make such supervision impracticable. It is clear, however, that the new rule places an undue burden on the individual to prove that the waiver or settlement was coerced. In many cases, the individual who signs such an agreement may be wholly unaware or misinformed of their rights and the protections under the Act. The rule also ignores the enormous difference in sophistication and bargaining power between an employer and an older worker, and forgoes the benefit which would be obtained by a case-by-case review of such agreements.

Ironically, the Commission initiated its new rule after a panel of the U.S. Court of Appeals for the Sixth Circuit held that the ADEA prohibited employers from seeking unsupervised waivers and releases. The court reasoned that remedies available under the ADEA are identical to those available under the Fair Labor Standards Act, which prohibits unsupervised waivers and releases as contrary to public policy. The Sixth Circuit *en banc* reversed the panel decision.[25] Congress recognized that the EEOC rule permitting waivers undermined the remedial purposes of ADEA, and through a rider on the EEOC appropriation for fiscal years 1988 and 1989, temporarily prohibited the EEOC from enforcing the rule. The Commission, however, has not acted to modify its rule.

B. Litigation

Under the Reagan administration the Commission also dramatically altered its litigation strategy in a number of key cases in ways that did not further the purposes of the Act or protect the employees' interests.

In some cases, the EEOC has taken a pro-employer stance. In other cases, the Commission allowed the commissioners' personal views, rather than the law, to influence official policy. In yet other cases, the EEOC undermined positions taken by victims of discrimination who initiated their own suits under ADEA.

1. Litigation Strategy in Favor of Employers

One blatant example of the Commission's shift in litigation strategy is the *Cipriano* case.[26] Initially, the EEOC did not seek to intervene in *Cipriano* until the district court asked that it do so. Thereafter, the general counsel drafted a brief contending that the employer's early retirement incentive plan violated ADEA by denying older workers the same benefits offered to younger workers. The Commission was unhappy with that argument, and ordered another attorney to redraft the brief. At the direction of the chairman and vice chairman,[27] the Commission ultimately decided not to intervene but rather file a friend of the court brief to oppose the employee's claim and to lay out the employer's defense.

In the *Paolillo* case,[28] several workers over age sixty asserted that their employer had coerced them unfairly into accepting early retirement. After the plaintiffs won on appeal, the EEOC filed a friend of the court brief seeking modification of the decision. The brief asserted that the court erroneously applied a lower standard of proof than that required under ADEA to prove an employer's "coercion." The EEOC sided with the corporate employer and another friend of the court, the New York Chamber of Commerce, against the plaintiffs.[29]

2. The Influence of Personal Opinions and Preferences

The Commission's litigating posture frequently appears to be influenced by individual commissioners' personal opinions and preferences, rather than reasoned interpretations of existing law. The *Lusardi* case[30] illustrates how far the Commission has strayed from principles of neutral law enforcement. In *Lusardi*, Xerox laid off over thirteen hundred workers for economic reasons. These layoffs affected a large percentage of older workers. The EEOC repeatedly refused to join the case because, in its view, the plaintiffs were adequately represented by counsel. However, EEOC staff suggest that certain commissioners' beliefs that an employer should be allowed to discriminate against older workers on economic grounds, even though the law is clearly to the contrary, was the real reason for not supporting the plaintiffs.[31]

3. Misallocation of Resources

The Commission's decision to focus its litigation efforts in the area of public safety raises questions about the misallocation of resources. Since 1987, the majority of cases initiated by the Commission challenge maximum hiring ages and mandatory retirement ages for public safety occupations.[32]

However, the Commission refused to join *Lusardi* to help laid-off workers, *despite* years of investigation and legal research in preparation of the employees' claims.[33] The EEOC general counsel originally recommended participating in both the *Cipriano* and *Lusardi* cases to challenge alleged discriminatory employment practices. However, the Commission rejected that advice and disapproved of the litigation, even though it had committed significant resources and investigator hours to those cases.

The EEOC also has failed to establish a clear policy on early retirement incentive plans. Companies frequently use Early Retirement Incentive plans (ERIs) in order to scale back their operations during mergers, downsizing, and restructuring. However, these plans are being challenged as coercive, weighted toward older workers, and in some instances, targeted against those workers nearest retirement. Although their use poses difficult legal questions, and there was clearly a need for case law to clarify the application of ADEA to ERIs, the EEOC has not yet filed a single case in this area.

IV. Recommendations for Change in Areas of Policy and Rulemaking

A. Case Backlogs

The Commission's top priority must be to restore its ability to process charges in a timely manner.

Improving the EEOC's overall efficiency does not simply require more funding. Instead, it requires administrative discipline to assure the timely processing of current charges, gradually lower the processing time on the backlog of charges, provide notice to complainants as charges near the expiration of the statutory period for filing suit, and support the special needs inherent in investigating pattern and practice cases.

B. Waivers and Settlements

EEOC rules which permit employers to obtain a waiver of rights and settlement of claims without court or EEOC supervision contradict the ADEA. The Commission should issue a rule to require supervision of waivers of rights and settlement of claims similar to the practice successfully employed for many years by the Department of Labor.[34]

C. Early Retirement Incentives

The Commission plans to issue rules pertaining to Early Retirement Incentive plans (ERIs). The EEOC must proceed cautiously to assure that the final rules in this area reflect judicial authority on the issue and place the burden on the employer to establish that such incentives are voluntary and free from age-based determinations.

D. The Apprenticeship Exemption

The EEOC should issue a final rule to end the current exemption of apprenticeship programs from the ADEA.

E. Pension Accruals, Credits, and Contributions

Rules governing pension accruals, credits and contributions must disallow any exception, including limits on years of service and participation, which are not explicitly set forth in statutory law.

F. Budget

Resources must be efficiently allocated to restore the Commission's litigation budget to levels equivalent to the levels in 1980.

G. Disclosure and Accountability

The Commission should follow its general counsel's litigation recommendations unless it provides written reasons for deviating from it.

The EEOC should immediately end its practice of not disclosing, to a complainant, information about the position of the employer charged with a violation. The Commission should also automatically notify a complainant of any pending lawsuit against the same party, and advise the complainant of the right to join the action as a class member or intervenor.

CHAPTER XIV

EQUAL EMPLOYMENT OPPORTUNITY

by Claudia Withers and
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I. Introduction

The role of the federal government is crucial in setting the appropriate tone for civil rights enforcement in this country. As is the case in private corporations, it is the attitudes and policies of those individuals at the top that establish the commitment of the United States to secure equal employment opportunity for minorities and women. Such was the example set by President Lyndon Johnson when he made a personal effort to secure the passage of the Civil Rights Act of 1964. It was during the Nixon administration, under then-Secretary of Labor George Schultz, that the concept of affirmative action "goals and timetables" was developed to measure progress in eradicating employment discrimination. Their actions demonstrated to millions of Americans the central role of the federal government in providing equal employment opportunity. In contrast, during the Reagan administration there has been a dearth of positive and consistent leadership by the federal agencies responsible for enforcement of employment discrimination laws. As a result, it will be necessary to rebuild and redirect the law enforcement capacity of the Equal Employment Opportunity Commission (EEOC), the Office of Federal Contract Compliance Programs (OFCCP), and the Department of Justice, if those agencies are to contribute positively to the elimination of employment discrimination and improving the economic status of women and minorities.

II. Status of the Workforce

The employment and economic status of women and minorities underscores the dimension of the task confronting the federal government if the nation is to eradicate employment discrimination.

A. Women

Women can no longer be seen as peripheral or temporary participants in the workforce. During the past five years the number of employed women has risen by nearly 8 million. As a result, in 1988, women accounted for 45 percent of all employed workers. Half of all black workers were women, 44.1 percent of all white workers were women, and 39.5 percent of all Hispanic workers were women. Moreover, the labor force participation rates among black, white, and Hispanic women are nearly equal. In 1987, 58 percent of black women, 55.7 percent of white women, and 52 percent of Hispanic women were in the labor force.[1]

As a result of the enforcement of antidiscrimination statutes and affirmative action remedies, some progress was made in increasing the percentage of women in traditionally male jobs. For example, the percentage of women lawyers increased from 5 to 14 percent, operations and systems researchers and analysts from 11 to 28 percent, pharmacists from 12 to 24 percent, and veterinarians from 5 to 13 percent.[2]

Notwithstanding that progress, in the first half of 1988, the majority of women were working in predominantly female, low-paying occupations. Women fill only 9 percent of the skilled precision production, craft, and repair worker jobs, and 26 percent of the operators, fabricators, and laborers. Even within these occupations, women are clustered in a narrow band of "female" job categories. Women accounted for 93 percent of all dressmakers, and 70 percent of electrical and electronic assemblers; both job categories which reflect women's traditional skills being transferred from the home to the factory.[3]

Most women are primarily clerical, service, and health workers and elementary and secondary school teachers.[4] Minority women, in particular black women, are "crowded" within traditionally female job categories. Black women generally hold the lowest paying among the traditionally female jobs: domestic and personal service work, child care workers, nurse's aides, and food counter workers.[5] Hispanic women, while also employed as clerical workers, are employed to a greater extent as operatives: dress makers, assemblers, and machine workers.[6]

Persistent occupational segregation of women results in a continuing disparity in wages. Currently women earn 65 percent of male earnings. The disparity is greater for minority women: black women earn 58 percent of male earnings, and Hispanic women earn 55 percent of male earnings.[7]

Women work because they must. The majority of women who work outside the home substantially or fully support themselves and their families. Minority women make an even larger economic contribution to their families than do white women.[8] The majority of women in the labor force in March 1987 were either single (25 percent), divorced (12 percent), widowed (4 percent), separated (4 percent), or had husbands whose 1986 total earnings were less than $15,000 (15 percent).[9]

Mothers are more likely to work outside the home than in previous years. The percentage of working mothers of school-aged children increased from 55 percent in 1975 to 72 percent in 1987, compared to 55 percent in 1975. By March 1987, 60 percent of all children under the age of eighteen had mothers in the workforce. Fifty-two percent of married women with children less than one-year old now work outside the home, compared to 39 percent in 1980. Both parents work in almost sixty percent of two parent families.[10]

The occupational segregation of women and the resultant disparity in wages means poverty for women and their families. In 1986, women represented 61 percent of all persons aged 16 and over who had incomes at--or below--the poverty level. In 1986, the proportion of poor families maintained by women was 51 percent. Nearly 75 percent of black families with incomes below the poverty level were headed by women. Forty-nine percent of Hispanic families and 42 percent of white families were similarly situated.[11] The poverty rate of all persons in families maintained by women with no husband present was 34.2 percent. The poverty rate for related children was higher: 54.4 percent.[12]

B. Blacks and Hispanics

In 1985, whites, Hispanics, and blacks had virtually identical labor force participation rates--65 percent, 64.8 percent and 62.7 percent, respectively.[13] The economic status of black and Hispanic citizens is also a national disgrace. In 1987, the poverty level for a family of four was $11,611; 21.4 million whites lived below the poverty level, compared to 9.7 million blacks (up from 9 million in 1986) and 5 million Hispanics. The poverty rate for whites decreased from 11 percent to 10.5 percent, while the poverty rate of blacks increased from 31.1 percent to 33.1 percent. The poverty rate for Hispanics was 28.2 percent.[14]

Similarly, the median income for black and Hispanic families is significantly less than the median income for white families. In 1987, the median income of black and Hispanic families was $18,100 and $20,310, respectively. In contrast, the median income of white families was $32,270. The median income for black and Hispanic married-couple families was $27,180 and $24,680, compared with $35,300 for white families.[15]

Blacks are more likely to be employed as wage and salary workers, while whites are more likely to be self employed. Among wage and salary workers, blacks are more likely to be employed in government positions, while white workers are more likely to be employed in private nonagricultural and agricultural sectors.[16] Black workers are clustered in four industry sectors: government, services, transportation, communications and public utilities and nondurable goods manufacturing.[17] Blacks are less likely than their white counterparts to be in managerial, professional, technical, or sales occupations; they are more likely to be laborers, service workers, and operatives.[18]

Hispanic workers account for over 7 percent of the labor force and are projected to account for 8 to 10 percent by 1995. Hispanics also work in occupations that are low-paid, low-skilled, and vulnerable to high rates of unemployment. Like blacks, Hispanics are underrepresented in managerial and professional occupations. They are overrepresented among operators, fabricators, and laborers. They are also over-represented in farm, farm-related and service occupations.[19]

As is the case with black workers, Hispanic workers face constant unemployment. A study by the National Council of La Raza indicates that Hispanic unemployment is usually 60 percent greater than that of whites, whether the economy is good or bad. The unemployment rate has been consistently highest for Puerto Ricans, and lowest for Cubans.[20]

C. Jobs and the Workforce in the Future

Between 1985 and 2000, minorities will make up 29 percent of the net additions to the workforce, and will be more than 15 percent of the workforce by the year 2000.[21] Black women will comprise the largest share of the increase in the nonwhite labor force. Black women workers also will outnumber black men workers.[22] Women will comprise approximately 60 percent of the *new entrants* into the labor force between 1985 and 2000, and 61 percent of all women will be at work, of whom, many will be working mothers.

Professional, technical, managerial, sales, and service jobs categories will grow the fastest in the future. More than half of the new jobs created in the future will require some education beyond high school, and almost a third will be filled by college graduates. Median years of education required by the new jobs that are created will be 13.5, compared to 12.8 for the current workforce.[23] There will be few jobs for the unskilled. The job will be in service occupations--cooks, nurse's aides, waiters, janitors, and administrative support--secretaries, clerks, computer operators, and marketing and sales, particularly cashiers.

The demographics of the future workforce clearly suggests there will be ample opportunity for discriminating employment practices to flourish absent vigorous and effective enforcement of civil rights laws. Of course, other programs are needed to train and retrain workers, and to accommodate the family responsibilities of all workers.

D. EEO as a Tool for Economic Advancement

Ending employment discrimination alone will not close the substantial economic disparities among men, women, and minorities.

For example, General Motors recently agreed to pay $2 to $6 million to settle a claim that black workers were systematically denied pay increases and promotions in plants in Michigan, Indiana, and Ohio. The Long Island Railroad agreed to pay $1.4 million in back pay, establish training and skills programs, and special promotional opportunities. And, the Mississippi State Employment Services was found to have discriminated against blacks in job referrals.

At the same time, agencies of the federal government have been called to account for discriminatory practices. Since 1972, approximately twenty class actions and a host of individual cases have resulted in decrees or settlements affording substantial relief to victims of discrimination in agencies including the Departments of State, Energy, Labor, the Federal Trade, Maritime Commissions, NASA, the General Accounting Office, and the Government Printing Office.

Approximately $40 million in back pay has been awarded since 1972 to victims of race and gender discrimination. Most recently, an internal report by the Navy identified widespread but subtle discrimination against minority sailors including practices such as channeling into nontechnical areas where opportunities for promotion are fewer, lower overall evaluations, and failure to direct recruiting advertising to minority areas.

III. The Agencies and the Laws They Enforce

The three agencies which have the primary responsibility for administering federal nondiscrimination employment laws are the Department of Justice, the Equal Employment Opportunity Commission and the Department of Labor. These agencies are responsible for enforcing the principle statutes--Title VII of the Civil Rights Act of 1964, and the Equal Pay Act--and Executive Order 11246 which prohibit race and sex discrimination in employment.

A. The Equal Pay Act, Title VII and Executive Order 11246

The Equal Pay Act (EPA), 29 U.S.C. Sec 206(d) was enacted in 1963 as part of the Fair Labor Standards Act (FLSA) of 1938. It prohibits sex-based differentials in wages paid for performance of work that is substantially equal in terms of skills, effort, and responsibility. The EPA applies to private and public sector employees, as well as to labor unions.

The Equal Employment Opportunity Commission is responsible for the enforcement and administration of the EPA. As proposed in June 1963, as part of a comprehensive civil rights bill then under consideration by the U.S. Congress, Title VII[24] prohibited discrimination in private employment on the basis of race, color, national origin, and religion. The ban on sex discrimination in employment was not added to the proposed legislation by its opponents in an attempt to rally opposition.

Proscriptions entered in Title VII are applicable to employers of fifteen persons or more, engaged in an industry affecting commerce, including employment agencies and labor unions. In 1972, Title VII was amended to cover public employers as well as educational institutions.

Since 1972, the Equal Employment Opportunity Commission, an agency created by the Civil Rights Act in 1964, has had authority to process, investigate and conciliate employment discrimina tion complaints and, if necessary, bring suits against employers and others in federal courts. The EEOC also has authority to promulgate interpretive regulations and guidelines delineating the nature of practices and policies prohibited by Title VII. However, only the Department of Justice may file suit against public employers.

Executive Order 11246, as amended, prohibits discrimination by businesses that contract with the federal government; it also requires federal contractors to implement affirmative action programs for the hiring and promotion of minorities and women.[25] Federal contractors and subcontractors employing fifty or more persons, and having $50,000 or more in federal contracts, develop a written affirmative action plan. Those plans, must include numerical goals and timetables to eliminate any underutilization of women and minorities in any job category.[26]

IV. The Enforcement Agencies

A. The Department of Justice

The jurisdiction of the Department of Justice to enforce[27] Title VII is limited to litigation to challenge discriminatory employment practices of state and local governments and, in a few cases, of federal contractors.[28] Despite that limited mandate, the Civil Rights Division of the Department of Justice has had considerable influence on the development of equal employment opportunity law by virtue of its control over federal civil rights litigation and policies, generally, and its responsibility for coordinating and reviewing all civil rights policies and regulations of federal executive agencies and departments.[29]

Prior to 1981, the Civil Rights Division had been in the forefront of effective efforts to vigorously enforce federal equal employment opportunity laws. The Division initiated, or participated in, precedent-setting employment discrimination cases. For example, the Division successfully litigated two of the earliest cases which established that Title VII prohibits overt, purposeful, discrimination as well as racially neutral practices that have a disproportionate adverse effect on protected groups or perpetuates the effects of past discrimination.[30]

The Division was also at the forefront in developing effective remedies for violations of Title VII. Its position in *United States v. Local 53, Asbestos Workers*,[31] "first established the principle that affirmative steps must be taken to correct the effects [of] past discriminatory employment practices."[32] The Division forged new ground by seeking judicial approval of important remedies, such as back pay and retroactive seniority, and forcefully argued in its cases--as well as in cases in which it participated as *amicus*--to sustain the use of numerical goals and timetables.[33] It did so under both Republican and Democratic administrations.[34]

In contrast, between 1981 and 1988, under the leadership of Assistant Attorney General William Bradford Reynolds, the Department of Justice retreated significantly from some well-established civil rights laws and policies and from the vigorous enforcement of other laws. At the same time, the Department and other federal agencies failed to develop and implement cohesive and consistent civil rights policies, frequently sending mixed signals to the courts. That inconsistency undermined the government's credibility and undercut the traditional deference courts traditionally gave it in the interpretation of federal equal employment statutes and regulations.[35]

1. *Policy Developments*

a. Change in Policy Regarding Affirmative Action Remedies.

Early in his tenure, Assistant Attorney General, William Bradford Reynolds abandoned the Department's tradition of vigorous enforcement of Title VII and support for effective remedies. In testimony before Congress, Reynolds announced that the Justice Department no longer would urge, or in any way support, "the use of quotas *or any other numerical or statistical formulae* as a remedy to correct systemic discrimination even when the Department proved in court that an employer had engaged in a pattern or practice of discrimination.[36] That newly adopted position was premised on the rationale that numerical measures under any and all circumstances constituted "preferential treatment" in violation of the "color blind" mandates of the Constitution and Title VII.[37]

The practical consequences of the Division's shift were soon evident. Rather than asking courts to impose--or employers to adopt--remedies to ensure the hiring and promotion of protected groups, the Division sought remedies that relied almost exclusively on recruitment programs.[38] If the relevant applicant pool included women and minorities, the Division deemed that the employer had taken sufficient remedial action. The actual number of women and minorities hired, or promoted, was irrelevant.

Such a policy was without support in federal constitutional and statutory law or logic. Goals and timetables and other numerical measures have been incorporated into court orders and statutes to eliminate historical job segregation and discrimination. Employers have developed affirmative action plans which include numerical criteria to measure the rate of progress in remedying the employer's underutilization of women and minority workers.[39] Title VII recognizes the broad remedial powers of courts to order affirmative action by employers who have violated the law.[40] Moreover, the Congress recognized the utility and appropriateness of affirmative action as a tool to eliminate discrimination in the federal workforce, in 1972, when it amended Title VII to add Section 717. Section 717 makes federal agencies responsible for implementing affirmative action plans for minorities and women.[41] Title VII, as it had been interpreted by the courts supported, encouraged, and sometimes required, the use of affirmative action. And, as early as 1978, the United States Supreme Court had articulated principles supporting and, subsequently, upholding the use of race-conscious remedies in education, contracting, and employment.

Several years prior to 1981, the United States Supreme Court upheld the use of race and sex-conscious programs in education, contracting, and employment in three cases--the first trilogy of affirmative action cases. In *Regents of California v. Bakke*,[42] five of the nine Justices held that race can be a factor in professional school admissions decisions. In *United Steelworkers v. Weber*,[43] the court upheld under Title VII a voluntary affirmative action program to provide training opportunities eliminate conspicuous racial imbalance in traditionally segregated job categories."[44] In *Fullilove v. Klutznick*,[45] the Court upheld federal legislation that set aside a minimum percentage of federally funded public works contracts for award to minority business enterprises.

b. Attempts to Overturn Affirmative Action Remedies.

The Division's repudiation of affirmative action remedies was not limited to cases initiated or unresolved as of 1981. Rather, the Department attacked and sought to undo affirmative action remedies that had been agreed to and ordered by courts in decrees entered prior to 1981. It did so by attempting to construe a narrow Supreme Court decision in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) in an overbroad fashion.

Stotts arose out of a 1977 class action filed by black fire fighters in Memphis alleging a pattern and practice of racial discrimination. The parties eventually agreed to a decree that established long-term affirmative action hiring goals. During a budget crisis in 1981, Memphis needed to lay off municipal workers, including firemen. The district court entered a temporary restraining order prohibiting the layoff of any black employees hired pursuant to the hiring goals set forth in the decree. White fire fighters with greater seniority took the case to the Supreme Court. The Supreme Court held that seniority may be awarded as a remedy only to identifiable individual victims of discrimination. Because the black employees, whose jobs were protected under the district court's layoff order, were not specifically proven victims of discrimination, they could not be given seniority as a remedy, and therefore, could not be retained over white employees with greater seniority. The Court made it clear that its holding dealt only with the retroactive application of Title VII's seniority provision.

Nevertheless, the Justice Department seized upon the decision in *Stotts* to argue that *all* forms of gender- or race-conscious relief were prohibited under the Constitution as well as Title VII.

Following *Stotts*, the Department sent letters to more than fifty state and local governments and agencies throughout the country seeking to reopen cases that the Division had settled pursuant to decrees which provided for race- and sex-conscious remedies. The Division contended that such remedies were unlawful under *Stotts*. Although virtually none of the recipients of those letters agreed to join the Department in motions to overturn the decrees,[46] it continued to advance its arguments in the courts. All seven of the federal appellate courts which considered the position by the Civil Rights Division[47] ultimately rejected it.

Attempted abandonment of hard fought and settled remedies provided the clearest evidence of its failure to enforce civil rights laws and policies. Its new emphasis was on the rights of white males--the beneficiaries of centuries of discrimination against women and minorities; comparatively little action was being taken on behalf of women and minorities. Thus, while the Department reopened fifty cases to dismantle affirmative action remedies which had proved effective, it filed only a yearly average of fifteen new employment discrimination cases on behalf of blacks and women.[48]

c. The Second Trilogy: The Supreme Court Responds

Despite repeated defeat in the federal appellate courts, the Department continued to argue its position in numerous Supreme Court affirmative action cases. On July 2, 1986, the Supreme Court issued opinions in three cases--the second trilogy of affirmative action cases. Once again, these decisions resoundingly rejected the arguments of the Department that race- and sex-conscious, and affirmative action, plans to remedy past discrimination are *per se* illegal under Title VII.

In *Wygant v. Jackson Board of Education*,[49] the issue was whether black teachers could be retained while more senior white teachers were laid off in order to preserve the gains of recent minority hiring. Although the Court rejected the layoff provision because it was not sufficiently tailored to achieve the purpose of retaining minority teachers, the Court held that race-conscious affirmative action plans are constitutional where there is "strong basis in evidence" of discrimination for adopting the plan.[50]

In the next case, *Local 93 v. City of Cleveland*,[51] the Court upheld a consent decree that reserved a certain percentage of promotions for black fire fighters. The Court held that affirmative action programs may benefit individuals who are not actual victims of the discriminatory practices. The Court emphasized further that Congress intended for voluntary compliance to be the method preferred for ensuring nondiscrimination in employment. Finally, in *Local 28, Sheetmetal Workers v. EEOC*,[52] the Court specified the circumstances under which race-conscious relief may benefit members of groups which have been discriminated against, but who have not been adjudicated to be actual victims of discrimination.[53]

In 1987, the Supreme Court provided further guidance . . . and again rejected contentions of the Justice Department . . . in its decisions in *U.S. v. Paradise*,[54] and *Johnson v. Santa Clara County Transportation Agency*.[55]

In *Paradise*, a federal district court held that the Alabama Department of Public Safety had engaged in a "blatant and continuous pattern of discrimination."[56] Accordingly it was ordered to hire one black trooper for each white trooper hired "until approximately twenty-five (25) percent of the Alabama state trooper force is comprised of Negroes." The order was affirmed by the Court of Appeals in 1974,[57] and a consent decree to implement the order was approved by the district court in 1981. The Department of Justice, which had earlier intervened in the case on behalf of the black victims of the discrimination, switched sides and appealed the court's order on the grounds that it was unconstitutional.[58]

The Supreme Court upheld the one-for-one promotion requirement because it was narrowly tailored to serve its purposes, necessary to eliminate the effects of Alabama's long-term, open, and pervasive discrimination, including the absolute exclusion of blacks.

In 1987, the Supreme Court was presented with its first opportunity to address the lawfulness under Title VII of sex-based voluntary affirmative action in *Johnson v. Transportation Agency of Santa Clara County*.[59] The Transportation Agency had voluntarily adopted an affirmative action plan after determining that women and minorities were severely underrepresented in many job categories within the agency.[60] Pursuant to the affirmative action plan, a fully qualified woman was promoted, over a marginally more qualified man, to a skilled crafts position in which women were drastically underrepresented. The male challenged the promotion as violative of Title VII. The Department of Justice submitted a brief as "friend of the court" on behalf of the male.

The Court held that the Agency's affirmative action plan was lawful because it had been adopted to redress a manifest imbalance of women workers in a traditionally segregated job category. The Court further held that the plan did not unnecessarily trammel the rights of male employees, nor did it create an absolute bar to their advancement.

d. Encouraging and Supporting Collateral Attacks on Affirmative Action Consent Decrees

Unfortunately, the efforts of the Department to undermine effective affirmative action plans did not cease after the Supreme Court repeatedly reaffirmed the lawfulness of affirmative action. Rather, the Department continued to support collateral attacks on negotiated settlements and consent decrees which embody affirmative action plans. For example, the Department advocated the adoption of a rule which would allow any third party who believes himself to be harmed by an employer's adherence to a court approved affirmative action plan to sue the employer in a wholly different and independent lawsuit. Thus, employers who wish to resolve discrimination suits would, by doing so, risk new rounds of expensive "reverse discrimination" litigation.

The Department sought that precise outcome in *Marino v. Ortiz*.[61] In *Marino*, a group of white police officers filed a lawsuit challenging the terms of a consent decree in a separate case between Hispanic and black police officers and the New York City Police Department. The consent decree provided for the promotion of black and Hispanic officers using court approved affirmative action procedures. The white officers had been provided with an opportunity to intervene in the original case and also to object to the terms of the proposed consent decree at a "fairness hearing" before the decree was approved by the federal district court. Assistant Attorney General Reynolds openly acknowledged that the Civil Rights Division adopted the strategy of supporting collateral attacks to discourage affirmative action.[62]

The Supreme Court by a divided vote (4-4) affirmed the Second Circuit's opinion, that the white officers should not be allowed to mount a collateral attack on the affirmative action consent decree approved by another court. The effect of the four-to-four split of the Supreme Court, however, is to leave open the question of whether to allow collateral attacks in other cases. And, indeed, the Department is supporting another collateral attack on an approved consent decree in *Martin v. Wilks*, a case involving black fire fighters in the city of Birmingham, Alabama.[63] The case currently is pending before the Supreme Court.

e. DOJ Attacks on the Uniform Guidelines for Employee Selection

One of the most significant developments in the field of employment testing and selection was the promulgation in 1978 of the *Uniform Guidelines on Employee Selection Procedures*.[64] The *Guidelines* were drafted jointly by the Department of Justice, the Labor Department, the Civil Service Commission (now the Office of Personnel Management), and the Equal Employment Opportunity Commission. The guidelines set forth common standards to be used by the federal agencies in evaluating the legality of employment tests and other practices under Title VII. The principles embodied in the *Guidelines* are based on the Supreme Court's landmark decision in *Griggs v. Duke Power Co.*[65] In *Griggs* the Court held that tests and other selection criteria for employment that have a disproportionate adverse impact on members of a protected class may not be used unless they are proven to be valid predictors of job performance.

The Reagan administration, making no secret of its distaste for *Griggs*, has argued, in the alternative, for a test that would require a showing of purposeful discrimination to prove a violation of Title VII.

Despite arguments by the Department to the contrary, a unanimous Court in *Watson v. Fort Worth Bank & Trust*,[66] held that subjective selection criteria are discriminatory, if they violated the *Griggs* disparate-impact theory. *Watson* concerned a black woman bank teller who was consistently denied promotion in favor of whites based on subjective criteria used by her white supervisors. The government's brief, signed by the Equal Employment Opportunity Commission, argued that proof of intentional discrimination rather than the *Griggs* disparate-impact theory should be applied to subjective employment practices.

And, in the 1988-89 term of the Supreme Court, it once again is considering a case challenging the applications of the *Griggs* disparate-impact theory to subjective employment practices. In *Atonio v. Wards Cove Packing Co.*,[67] the brief submitted by the Department contends that the Court should lower the burden of proof on an employer to show that a particular employment practice is job related or a business necessity.[68]

f. Federal Sector Employment Practices

Early in his tenure as assistant attorney general, William Bradford Reynolds also sent a letter to the heads of all federal departments and agencies to discourage initiatives to hire and promote minorities and women pursuant to affirmative action plans. The letter advised that the Department "is unable to conclude at present that there is statutory authority for compelling [the] use [of goals and timetables] in affirmative action planning."[69] In addition, the Department was one of two agencies[70] which failed to comply with federal law that required all federal departments and agencies to evaluate their employment practices, identify barriers to the hiring and promotion of women, minorities, and the handicapped, and develop affirmative action programs for each job classification where there is significant underrepresentation of members of those protected groups.

2. *Recommendations for the Department of Justice*

A. The Assistant Attorney General for Civil Rights should be a lawyer with both substantial experience in, and commitment to, civil rights enforcement. He must enforce statutes enacted by Congress and interpreted by the courts and duly promulgated regulations, regardless of personal views until such statutes and regulations are modified.

B. The number of new cases that the Department initiated in the past eight years has been woefully inadequate, given the magnitude of discriminatory employment practices against women and minorities.

It has become increasingly expensive to litigate Title VII cases and private lawyers have become reluctant to represent women and minorities--victims of discrimination--even though attorneys fees may be recovered if they prevail. Consequently, the Department must target its litigation against defendants who can provide the greatest opportunity for economic advancement and upward mobility.

C. The Division should reestablish its leadership role in pursuing the innovative remedies. In addition to affirmative action recruiting and hiring remedies that include goals and timetables, the Division should promote employer-provided or -financed job training and educational programs that promise to develop and enhance skills as remedies in traditionally segregated jobs including high-level staff positions in local and state public agencies.

B. The Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC), is responsible for enforcing a variety of federal statutes guaranteeing equal employment opportunity, including of Title VII, the Equal Pay Act,[71] the Age Discrimination in Employment Act, Section 501 of the Rehabilitation Act of 1973 (which prohibits discrimination on the basis of handicap),[72] Section 717 of Title VII of the Civil Rights Act (covering equal employment opportunity for federal employees), and the Fair Labor Standards Act Amendments of 1974 (which prohibits age discrimination in federal employment).

Since Executive Order 12067 was adopted in 1978, the EEOC has had responsibility for providing "leadership and coordination to the efforts of Federal departments and agencies to endorse all Federal statutes, Executive orders, regulations and policies which require equal employment opportunity."[73] An interagency memorandum of agreement between the EEOC, OPM and the Department of Justice reaffirmed EEOC's position as the lead agency for coordinating all Federal EEOC programs.[74]

The EEOC's primary enforcement tools are to investigate and resolve complaints of discrimination filed by individuals, to initiate suits to challenge patterns and practices of systemic discrimination, and to intervene in suits brought by private parties.

During the Reagan administration, the EEOC failed to fulfill its role as the lead federal agency for coordinating EEO enforcement policies, and to investigate and resolve complaints in a timely manner. A number of factors contributed to that result. First, there was substantial turnover in the leadership of the Commission. Second, many of those appointed to leadership positions had little or no expertise in EEO law, or commitment to the agency. Third, management systems to ensure the resolution of complaints on a timely basis were dismantled and were not replaced by other effective programs. Fourth, EEOC Chairman, Clarence Thomas, permitted the Department of Justice unilaterally to direct federal EEO policy, and switched positions on important issues, such as affirmative action, thereby further eroding the effectiveness of the Commission as a law enforcement agency.

1. EEOC Leadership

Policy at the EEOC is made by five commissioners who are nominated by the president and confirmed by the Senate. At this writing, they are: Chair, Clarence Thomas; Vice-Chair, Rosalie Silberman; and commissioners, Tony Gallegos, Joy Cherian, and Evan Kemp. Equally important to the interpretation and enforcement of EEO laws by the agency is the general counsel, who must also be confirmed by the Senate.

There were a number of changes among the Commissioners during the Reagan administration. New Commissioners included William Webb and Fred Alvarez (who both resigned), Rosalie Silberman, Evan Kemp, and Joy Cherian. Neither Silberman nor Cherian had prior EEO experience before becoming commissioners.

President Reagan's initial choices for EEOC chair and general counsel offered little evidence to inspire confidence that the Commission would be run effectively. The first nominee for chair of the EEOC, William Bell, a black Republican from Detroit, Michigan who ran an executive search firm, was strongly criticized for his lack of administrative and civil rights experience,[75] and ultimately his nomination was withdrawn.

Clarence Thomas, the second nominee, and current chair of EEOC, was not confirmed until May of 1982, almost eighteen months after the beginning of the Reagan administration. Thomas, a lawyer, had served as the head of the Office of Civil Rights in the Department of Education, and on Reagan's EEOC transition team in 1981. Although there was no outright opposition to Mr. Thomas' reconfirmation in the summer of 1986, a number of civil rights and women's organizations, expressed grave concerns about his performance.[76]

The position of general counsel in the Reagan administration, was a lightning rod for controversy. Michael Connolly, the first general counsel appointed by President Reagan, resigned in the fall of 1982 after mounting criticism that he was too sympathetic to employers, and had dropped or settled cases over the objections of his staff, sometimes after communications from the management community.[77]

The tenure of the next general counsel, David Slate, was relatively short.[78] Slate resigned after a confrontation with Chair Clarence Thomas, over Slate's criticism in an internal memo of Thomas' system for handling the processing of cases.

Jeffrey Zuckerman, Clarence Thomas' Chief of Staff, was Reagan's third nominee for general counsel. Zuckerman, who had been an attorney in the Anti-trust Division of the Justice Department, had no background in civil rights litigation, and in his confirmation hearings and in meetings with representatives of advocacy groups, took positions that were antithetical to the clear purposes of the antidiscrimination laws and contrary to legal precedent and EEOC policy. For example, he opposed the use of affirmative actions goals and timetables, and questioned the validity of the Uniform Guidelines for Employee Selection Procedures. Regarding age discrimination, Zuckerman stated that worker eligibility for retirement was a "reasonable factor other than age," and thus, a valid defense under the Age Discrimination in Employment Act. Zuckerman had also challenged the validity of the Equal Pay Act of 1963, suggesting that paying women less than men would make them more attractive to employers who would not otherwise be inclined to hire them. Zuckerman's nomination was rejected by the Senate Labor and Human Resources Committee. The current EEOC General Counsel is Charles Shanor. Shanor, a former law professor at Emory University, was confirmed with little difficulty in 1987.

Early in the Reagan administration, the Commission attempted to fulfill its obligation under Executive Order 12067, and to be the lead agency on EEO issues. The Commission's most visible efforts were on the issue of affirmative action. In *Williams v. New Orleans*,[79] which involved discrimination against black applicants and police officers in hiring and promotion, the EEOC attempted to file an *amicus* brief in support of affirmative action goals and timetables.[80] Similarly, the EEOC filed comments strongly criticizing an OFCCP proposal to weaken the affirmative action regulations implementing Executive Order 11246.

Ultimately, however, even these early efforts to be independent from the Justice Department, were unsuccessful. The EEOC did not file its *amicus* brief in the *Williams* case, and Thomas testified in a congressional hearing that he did not believe the EEOC had the authority to file *amicus* briefs in public sector cases.[81]

Processing of Individual Complaints of Discrimination

Individuals seeking redress of discriminatory-employment practices under Title VII must file a charge with the Commission; the Commission then investigates the charge to determine whether discrimination has occurred. The Commission also investigates charges of unlawful discrimination under the Age Discrimination in Employment Act,[82] and the Equal Pay Act.[83]

A "backlog" of charges, which causes substantial delay in the resolution of claims, has plagued the Commission since its creation. During the Carter administration, the EEOC implemented management systems in order to reduce a substantial backlog of charges. The goal of these management systems was to facilitate prompt settlements and avoid unnecessary extended investigation which would burden the charging party, employers, and the agency. The "Rapid Charge Processing" system, through face-to-face conferences between complainants and employers, reduced the average length of time for processing a charge from an average of approximately two years to three to six months.[84] Under the Reagan administration, the EEOC dismantled those systems.[85] From 1983 to 1985, the Commission adopted policies requiring full investigation of every charge filed,[86] a new enforcement policy,[87] and in February of 1985, an "Individual Remedies and Relief" policy, which stated the belief of the Commission in full remedies for all victims of discrimination.[88] In 1986, the Commission adopted additional enforcement policies, including a policy that would allow complainants to appeal "no cause" findings by District Directors to the EEOC headquarters in Washington.[89]

2. *EEOC Performance Data*

All available evidence indicates the policy shift has been a disaster and earlier gains have been lost. Managerial systems implemented in the 1970s helped reduce the backlog from 126,000 in 1975 to 55,000 in 1980 to 31,000 in 1983, when they were dismantled. Moreover, the number of charges has increased steadily from 29 percent in 1981 to a high of 59.5 percent in 1986. In 1987, the no-cause rate decreased slightly to 55.3 percent. Since then, the backlog of complaints has doubled to 61,686.

An average length of time for processing individual charges is now 9.3 months, compared to the three to six and a half months in the last full year of the Carter administration.[90] It might be argued that the increased time for processing individual charges is due to the Commission's new investigation policy; however, an October 1988 report released by the General Accounting Office (GAO) demonstrates that the Commission's full investigation policy has had little effect on the actual investigation of individual charges. The GAO reviewed the investigations of charges that had been closed with no cause determinations by six EEOC district offices and five state agencies from January through March of 1987. The GAO study found that 41 to 82 percent of the charges closed by EEOC offices were not fully investigated, and 40 to 87 percent of the charges closed by state agencies were not fully investigated. GAO noted that the factors that contributed to incomplete investigations included (1) a perception by the investigative staff that the Commission was more interested in closing cases to reduce the backlog than full investigations, (2) disagreement on the EEOC's full investigation requirements, and (3) inadequate EEOC monitoring of state agencies' investigations.[91]

The Individual Remedies and Relief Policy adopted by the Commission has also come in for substantial criticism. First, the focus on individual relief to the apparent exclusion of classwide relief, coupled with the decrease in class action litigation, demonstrates the administration's narrow focus on individual victims of discrimination. Second, the policy contravenes well established legal precedent in recommending that incumbent white employees be bumped from positions in favor of victims of discrimination.[92]

3. *Litigation*

The Equal Employment Opportunity Commission has historically been able to advance the law and aid women and minorities in achieving equal employment opportunity through litigation. During the Reagan administration, the use of litigation by the EEOC as a tool to fight employment discrimination was adversely affected by enforcement deficiencies, ad hoc policy changes, and lack of direction. Indeed, in *EEOC v. Sears Roebuck*, a pattern and practice case litigated during the Reagan administration, the Commission received more negative publicity generated by Clarence Thomas' statements on the use of statistics than it did accolades for endeavoring to remedy the discrimination alleged by the women. The increasing no-cause rate had a direct impact on the cases filed by the Commission. In 1981, the EEOC filed 368 cases in court. But, in fiscal year 1982, only 164 cases were filed, and there was little real progress in the next three years; in 1983, 136 cases were filed, 226 in 1984, and 286 in 1985. It was not until 1986 that the Commission filed more cases than had been filed in the last year of the Carter administration; 427 in 1986, and 430 in 1987.[93] The increase was hardly outstanding; only sixty-two more cases were filed in 1987 than in 1981. In addition, the Commission's filing of *amicus* briefs declined from 89 in 1979 to 16 in 1985.

What is of particular concern is that of the lawsuits filed by the Commission, a very small percentage have been lawsuits attacking systemic discrimination. In prior administrations, the EEOC has placed a priority on systemic litigation, recognizing that such cases are an excellent way to maximize limited resources for greatest effect. In fiscal year 1980, 218 cases challenging systemic discrimination were filed by the Commission. As a result of the Reagan administration's focus on "identifiable victims of discrimination," the numbers of systemic cases filed by the EEOC dropped substantially. In fiscal years 1982 and 1983, less than one hundred such cases were filed.[94] Notwithstanding the Commission's protestations that its emphasis had *not* shifted away from systemic cases, the numbers tell a different story.

4. *Enforcing Antidiscrimination Laws for Federal Employees*

In 1978 the EEOC received responsibility for handling the EEO complaints of federal employees.[95] The system, established by the Civil Service Commission, of delegating to agencies the responsibility for investigating and deciding charges of discrimination filed by their own employees, was retained.[96] This system, which remains essentially intact, has been the subject of repeated criticism because of the apparent conflict of interest involved in having agencies investigate their own complaints of discrimination, and the considerable delays experienced by charging parties in the resolution of their claims.[97]

Data from the EEOC supports these concerns. In fiscal year 1987, the agencies accepted over 90 percent of the recommended decisions finding no discrimination. Agencies accepted only 37.3 percent of the recommended decisions finding discrimination. The average number of days to closure for complaints by agency decision increased to 683 from 615 days in fiscal year 1986. In 1987, the average number of days to closure for all types of closures was 392 compared to 344 days in 1986. Agencies accept a greater percentage of recommended decisions of no discriminations than those finding discrimination.[98]

In 1988, the EEOC finally responded to the growing demand for reform of EEO procedures for federal employees and applicants. Its proposal, among other things, would have eliminated from the investigative stage the right to a hearing. The full Commission voted not to publish the proposal for public comment. Civil rights advocates, members of Congress, and the Commissioners, who voted against publishing the proposal for public comment, were concerned that it took away rights of federal employees and did not really correct the deficiencies in the federal EEO administrative process.

5. *Policy Developments*

a. Affirmative action

The EEOC, although initially not as ideological in its approach as the Department of Justice, was at best a lukewarm supporter of affirmative action. EEOC Chairman, Clarence Thomas, initially supported the use of affirmative action,[99] but changed his public position shortly after the 1984 election, asserting that "the next four years will be marked by concerted efforts to set forth the Reagan administration's position on affirmative action."[100] The Commission subsequently failed to enforce federal laws and regulations requiring affirmative action remedies.

In 1986, Acting General Counsel, Johnny Butler, announced that the agency would no longer seek to include goals and timetables in the consent decrees that it negotiated with employers. This change in policy was effected in spite of the EEOC's own guidelines on affirmative action, which sanction the use of goals and timetables.[101] The practice stopped only after substantial pressure was put on the EEOC by the civil rights community and Congress.[102]

Similarly, during the Reagan administration, the EEOC effectively abdicated part of its responsibility under Section 717 of Title VII of the Civil Rights Act of 1964 to ensure that federal agencies adopt effective programs of affirmative action. In the face of the refusal of the Department of Justice and other agencies to submit goals and timetables; the EEOC claimed that it was powerless to force the submission of the requisite documents.[103]

b. Uniform Guidelines for Employee Selection Procedures

Along with the Department of Justice, the Commission challenged the Uniform Guidelines. In 1984 and early 1985, EEOC Chairman, Clarence Thomas, proposed revising the Uniform Guidelines because of his concern that the adverse-impact theory was "conceptually unsound."[104] And in commenting on *EEOC v. Sears Roebuck*,[105] a pattern and practice case that the Commission was then litigating, Thomas questioned whether the use of statistical evidence was ever sufficient to make out a case under Title VII.[106] Thomas later retreated from this position, and acknowledged that the Uniform Guidelines, the supporting case law, and the use of statistics in proving information were legitimate.[107]

c. Wage Discrimination

Despite the advances that women have made in the labor market, they remain clustered in a few female-dominated job classifications---clerical, teaching, nursing, etc. Even in the few situations where women perform the same tasks as men, they are often paid less.

The Equal Pay Act of 1963[108] prohibits sex-based discrimination in jobs that are equal or substantially equal. Recognizing the broader reach of Title VII, the Supreme Court in *Gunther v. County of Washington*[109] held that Title VII forbids sex-based wage discrimination in jobs that may not be substantially equal.[110]

During the Carter Administration, the EEOC launched a number of positive initiatives in the area of sex-based wage discrimination. The agency commissioned the National Academy of Sciences to conduct a study to determine how wage-setting practices operate to discriminate against women, and the feasibility of creating bias-free, wage-setting mechanisms.[111] The Commission held a series of hearings on wage discrimination and job segregation in the spring of 1980.[112] The EEOC also participated as *amicus* on behalf of women workers in *Gunther v. County of Washington.*[113]

Under President Reagan, the EEOC did little to build on these efforts. On September 15, 1981, the Commission issued a ninety-day notice to "provide interim guidance in processing Title VII and Equal Pay Act claims of sex-based wage discrimination."[114] Despite the existence of the notice, which gave instructions to EEOC field office for investigating sex-based wage discrimination claims, charges were mishandled; they were dismissed for no cause, or were not investigated at all.[115] When charges were forwarded to the Commission in Washington, D.C., they were "warehoused" with no action taken. According to internal EEOC memoranda, in 1984, as many as 269 such charges were pending.

In failing to exert early leadership in this area, the EEOC allowed the Department of Justice to set administrative policy. Thus, in *AFSCME v. State of Washington*,[116] a celebrated case in which the trial court found the state of Washington to be in violation of Title VII regarding its pay practices, Assistant Attorney General, William Bradford Reynolds decided that the Department of Justice would enter the case on the side of the employer.[117] Mr. Reynolds made his decision before completing a review of the record in the *AFSCME* case, and despite the fact that EEOC Chairman Thomas, had acknowledged that the trial court in *AFSCME* was only adhering to the precedent set by *Gunther*.[118]

After several years of prodding by Congress and pay equity advocates, the EEOC finally took a position on wage discrimination in June of 1985. In this "Commission Decision Precedent", the EEOC decided that Title VII covers only those sex-based wage discrimination claims where there is evidence of intentional discrimination. Thus, claims involving wage-setting practices that had a disparate impact on women were not--absent evidence of an intent to discriminate against women--a violation of Title VII.[119]

The EEOC's ambivalence about its policy in the area of sex-based wage discrimination resulted in the agency's failure to file gender-based wage discrimination cases that went beyond a simple Equal Pay Act analysis. Nor did the EEOC exhibit any initiative in filing cases under the more settled provisions of the Equal Pay Act. In 1987, only twelve Equal Pay Act lawsuits were filed by the Commission, compared to the seventy-nine suits filed in 1980, and the fifty filed in 1981.[120]

d. Sexual Harassment

Since 1977, federal courts have acknowledged that sexual harassment is a form of sex discrimination under Title VII.[121] EEOC guidelines on sexual harassment became effective in 1980.[122] Early in the Reagan administration, those sexual harassment guidelines were in some danger. Michael Connolly, then EEOC General Counsel, stated that the guidelines' interpretation regarding supervisory liability were too strict. There were also efforts to undermine the sexual harassment guidelines under the guise of regulatory reform.[123]

Rather than support its guidelines, which set forth a strict standard of liability in cases where a supervisor is alleged to have sexually harassed a co-worker, the EEOC filed a brief in *Meritor Savings Bank, F.S.B. v. Vinson*[124] suggesting instead that in hostile environment cases, the courts rely on agency principles.[125]

The Court ruled in *Vinson* that proving a violation of Title VII of the Civil Rights Act of 1964 in sexual harassment case does not require a showing of economic detriment; a plaintiff may establish a violation of Title VII by showing that an employer has discriminated on the basis of sex by creating a hostile and abusive working environment. It held further that a plaintiff's "voluntary" involvement in sexual activity does not preclude a claim of sexual harassment; the issue is whether sexual advances are *unwelcome*. The Court quoted the EEOC guidelines with approval, and in accordance with the position taken by the Commission in its *amicus* brief, did not issue a definitive rule on supervisory liability, noting that a court should look to agency principles for guidance in determining employer liability.[126]

In 1988, the EEOC issued a policy statement on sexual harassment to implement the *Vinson* decision.[127] The standard regarding supervisor liability is less stringent than the strict liability standard set forth in its previously published guidelines. Under the new policy statement, an employer is liable for a supervisor's harassment if he or she knew, or should have known, about the harassment upon reasonably diligent inquiry, and if he or she failed to take immediate and appropriate corrective action.[128] In addition, the 1988 policy construes the scope of the employer's constructive knowledge fairly broadly; where sexual harassment is "openly practiced in the workplace or well-known among employees," the employer will usually be deemed to know of sexual harassment.[129]

Although the EEOC's policy statement did not vitiate prohibitions on sexual harassment set forth in the guidelines, recent EEOC actions in the courts seem geared to that end. In *Miller v. Aluminum Company of America*,[130] the EEOC filed a brief with the Third Circuit stating that "favoritism toward a female employee because of a consensual romantic relationship with a male supervisor is not sex discrimination within the meaning of Title VII.[131] In doing so, the Commission apparently contravened its own official guidelines.[132] Further, the *Miller* brief contravenes the position taken by the EEOC six years before in a decision involving the United States Postal Service.[133]

e. Pregnancy Discrimination

In 1978 Congress passed the Pregnancy Discrimination Act as an amendment to Title VII of the Civil Rights Act of 1964. In *General Electric Co. v. Gilbert*,[134] the Supreme Court held that the provision of lesser benefits for pregnancy than for other conditions was not gender-related and thus not a violation of Title VII. In response, the PDA prohibits discrimination on the basis of childbirth, pregnancy, or related medical conditions.[135] During the Carter administration, the EEOC developed regulations on pregnancy discrimination. Indeed, the EEOC has taken the position that discrimination on the basis of pregnancy violated Title VII[136].

In most of the pregnancy cases that came before the Supreme Court, the EEOC has generally taken positions in support of strict equality of benefits regardless of the circumstances. Thus, in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,[137] the Court upheld the EEOC's position that a health insurance plan that provides greater pregnancy-related benefits to female employees than to the spouses of male employees, discriminates against the males and is thus violative of the PDA. In *California Federal Savings & Loan v. Guerra*,[138] the government took the position that a California law providing for unpaid leave for up to four months for employees disabled by pregnancy, but not other disabilities, violated Title VII.[139] However, that view was not endorsed by any of the women's legal groups that filed *amicus* briefs, and indeed, the Court upheld the California law.

f. Gender-based Stereotyping

As more women have gained entry into the corporate arena, they have been evaluated by colleagues and superiors who have judged them not on ability, but on the basis of gender. Such women face a "glass ceiling" above which they cannot rise. Employment discrimination cases involving such situations will be part of the "second generation" of employment cases to developed in coming years. Indeed, such stereotyping applies to race and ethnicity as well. Blacks and Hispanics are also the victims of ill-conceived and racist stereotypes. Women of color may be most at risk, as they labor under the burden of discrimination based on sex *and* race or ethnicity.

During the 1988-1989 term of the Supreme Court, it has the opportunity to interpret Title VII in a manner that responds to the need to eradicate the stereotyping of women that limits their employment opportunities. In *Hopkins v. Price Waterhouse*,[140] Ann Hopkins was denied advancement to partnership status at the accounting firm of Price Waterhouse even though she brought in more new clients than anyone else in her partnership class and generated approximately 44 million dollars of business annually. Her objective business achievements were ignored, and instead her personality--"unladylike", hard-charging, aggressive, and allegedly unfeminine behavior--became the operative factor in the decision to deny her partnership. There was particular focus on behavior that would have been acceptable, and perhaps even admired, in a similarly-situated man but became a liability for Ann Hopkins, who was told that she needed a "course in charm school" to qualify for partnership.

Ann Hopkins and *amici* in support of Hopkins, contend that she was evaluated in terms of sex-based stereotypes which prescribe specific forms of behavior and appearance for women, and an employer's reliance on such stereotypes constitutes direct evidence of intentional discrimination in violation of Title VII. The government chose to side with the employer, arguing, among other things, that stereotyping, without more, does not violate Title VII.

6. *Recommendations for the Equal Employment Opportunity Commission*

a. Enforcement

1. EEOC commissioners and senior staff should have substantial experience in, and a strong commitment to, civil rights and the enforcement of the antidiscrimination laws.

2. The EEOC should reassert its leadership role pursuant to Executive Order 12067 by taking the initiative to promulgate EEO policies and coordinate enforcement strategies among federal agencies.

3. Agency officials should meet with interested individuals and organizations on a regular basis to discuss policy initiatives.

4. The EEOC should reaffirm its support for the use of goals and timetables in appropriate cases.

5. The EEOC should aggressively train agency personnel, particularly EEO intake and investigatory personnel, as well as trial attorneys governmentwide, so that they can conduct thorough and efficient investigations.

6. Management systems to process complaints must be established to reduce the intolerable backlog of charges. Some charges will be more appropriately handled under "rapid charge processing," while others will warrant a "full" investigation. All charges cannot be investigated in the same fashion. Attorneys should assist in the intake process to categorize charges for investigation and possible litigation.

7. Charging parties and their representatives should be informed regularly of the status of an investigation. The information provided to them should include a timetable for the completion of the investigation. Similarly, charging parties should be informed of the end of the statutory 180-day period, so they can decide whether to request a right to sue letter to initiate a suit in federal court.

8. Agency investigations should not be evaluated according to the number of investigations they complete. A more appropriate benchmark for evaluating performance is the quality of investigations and the standards used.

9. The EEOC must enhance its monitoring supervision of the states and local jurisdictions to which it refers charges for investigation.

b. Litigation

1. The EEOC *must* engage in more systemic litigation; the patterns and practices of discrimination in many industries and individual companies are so large and complex, that only the federal government has the resources to conduct thorough investigations.[141] Task forces of lawyers and investigative staff should be formed to specialize in such cases.

2. EEOC District offices should work closely with civil rights and women's organizations to develop systemic litigation and pattern and practice investigations.

V. Office of Federal Contract Compliance Programs

The Office of Federal Contract Compliance Programs (OFCCP) implements Executive Order 11246, as amended.

The first executive order forbidding nondiscrimination by federal contractors was signed by President Roosevelt in 1941.[142] Two years later, the coverage of the Executive Order was extended to all federal contractors or subcontractors.[143] Presidents Truman and Eisenhower followed with more expansive executive orders. In 1945, Truman's Executive Order 9004 directed the Fair Employment Practices Committee "investigate, make findings and recommendations, and report to the President with respect to discrimination in industries . . ." The Committee, in its final report, noted that the Executive Order program had benefitted minority workers.[144] It noted further, however, that the discriminatory practices were too entrenched to ". . . be wholly carved out by patriotism and presidential authority,"[145] and that the advances made by minority workers during wartime disappeared as soon as wartime controls relaxed.[146]

During President Eisenhower's first term, he signed Executive Order 10479, promoting equal employment opportunity by government contractors and establishing a Committee on Government Contracts composed of representatives of industry, labor, government and private citizens. This committee was chaired by then Vice President Richard M. Nixon.[147] In 1954, President Eisenhower signed an additional order which was the first to specify the text of the nondiscrimination provision to be included in government contracts and subcontracts.[148] The Committee noted in its final report that the barrier to increased minority employment was *not* overt discrimination; rather, it was ". . . *the indifference of employers to establishing a positive policy* of nondiscrimination".[149] (Emphasis in the original)

In 1961, President John F. Kennedy signed Executive Order 00925, which established the President's Committee on Fair Employment Practices. Executive Order 00925 not only prohibited discrimination by federal contractors, but required that they take affirmative action to ensure equal employment opportunity on the basis of race, creed, color or national origin.[150]

Executive Order 11246, issued by President Johnson, built upon the contract compliance program initiated by President Kennedy. It continued the affirmative action requirement and provisions for sanctions. Johnson assigned responsibility for enforcing the Executive Order program to the Secretary of Labor, who created the Office of Federal Contract Compliance (OFCC). In 1967, President Johnson issued Executive Order 11375, which amended 11246 to include sex among the categories protected against discrimination.

In May, 1968, the OFCC issued its first regulations describing the affirmative action obligations of non-construction contractors, introducing for the first time the concept of "goals and timetables".[151] In 1970, then Secretary of Labor, George Schultz, issued Order No. 4, which specified the nature of the affirmative action plans federal contractors were required to implement.[152] Revised Order No. 4, issued by then Secretary of Labor, J. D. Hodgson, in December 1971, required contractors to establish employment goals for women.[153]

A. Reagan Administration Efforts to Weaken the Executive Order Program

The requirement of affirmative action by Executive Order 11246, as amended, when effectively enforced by the Office of Federal Contract Compliance Programs, has had a salutary effect on the employment opportunities of women and minorities. A 1983 study of the enforcement of the Executive Order program, comparing contractor and noncontractor establishments, found that affirmative action had been instrumental in promoting the employment of women and minorities.[154] A 1984 OFCCP report reached the same conclusion.[155]

In spite of positive evidence that affirmative action works and that the contract compliance program administered by the OFCCP was particularly effective in improving equal employment opportunity for women and minorities, Reagan appointees instituted measures which drastically weakened OFCCP's enforcement program, and women and minorities achieving equal employment opportunities.

During the Reagan administration, OFCCP suffered from a lack of strong and consistent leadership. OFCCP was without a director twice, leaving the assistant secretary for employment standards responsible for running the smaller agency. Ellen Shong was the first Reagan appointee to head OFCCP. It was under the stewardship of Ms. Shong that OFCCP began to focus on programs of voluntary compliance by federal contractors to the detriment of strong enforcement. Beginning with revised regulatory proposals, moving next to policy changes without benefit of the legal requirements of the regulatory, and culminating in an unprecedented attempt to rewrite the Executive Order itself, the OfCCP failed to vigorously enforce the law.

B. Regulatory Proposals

Under President Carter, the OFCCP spent substantial time revising the affirmative action regulations in consultation with civil rights groups and the contractor community. The revised regulations were to go into effect on January 25, 1981, but as soon as the Reagan administration began on January 21, 1981, OFCCP officials suspended the Carter regulations and proposed their own revisions.[156] The new regulations, proposed by the Reagan administration, would have exempted 75 percent of federal contractors from having to prepare written affirmative action plans. For the contractors who were still required to prepare plans, other roll-backs were proposed: contractors who had long-term affirmative action plans were to get five-year exemptions from compliance reviews; compliance reviews prior to the award of large contracts were to be eliminated;[157] and employment goals for women in construction were to be established on an aggregate basis rather than craft basis (thus, the 6.9 percent goal established for women would apply to a whole workforce, rather than to specific trades).

The Reagan administration proposals were assailed by the contractor and civil rights communities. Moreover, other federal agencies, specifically the EEOC,[158] and the U.S. Commission on Civil Rights, also criticized the proposed regulatory changes. The uproar was such that the proposed regulations were never made final.

C. Policy Changes

However, the failure by the Reagan OFCCP to finalize its proposals pursuant to the Administrative Procedures Act did not prevent a change by fiat in the enforcement of the Executive Order. The OFCCP implemented many of its proposals through internal directives and oral instructions to regional offices.[159] The agency narrowed the standards for eligibility for back pay by limiting the period of time for which back pay would be sought.[160] It also made it more difficult to prove systemic discrimination.[161]

An example of the way in which the OFCCP under Reagan chose to circumvent the requirements of the Administrative Procedure Act was through the establishment of the National Self Monitoring Reporting System (NSMRS) in 1982. Under the NSMRS program large multi-facility contractors would monitor their own affirmative action performance with little or no oversight by the OFCCP.[162] The OFCCP and the contractor entered into written agreements which required the contractor to submit annual reports concerning the status of their workforce. In return, OFCCP would eliminate the contractor from routine compliance reviews, relying instead on the date in the annual reports. Civil rights groups learned in early 1984 that agreements had been established with AT&T, IBM, Hewlett Packard, and General Motors, and that discussions were being held with a number of other groups.

For a variety of reasons, the NSRMS program was the subject of concern in the civil rights community, in Congress, and even in the Department of Labor's Solicitor's Office, which thought the program vulnerable to legal challenge.[163]

During a congressional hearing in 1984, Susan Meisinger, then Assistant Secretary of Labor for Employment Standards, agreed not to enter into any additional agreements until a written policy had been developed and approved. Although coverage was not extended to any *new* companies, OFCCP extended two existing NSMRS agreements. Notwithstanding Ms. Meisinger's assurances, OFCCP never issued any regulations or policy directives concerning the NSMRS program. Because of the NSMRS program, OFCCP excluded large federal contractors with numerous employees from its review process. The agency was consequently unable to monitor the ongoing EEO compliance of these contractors.[164]

D. Attempts to Change Executive Order 11246, as Amended

Since the inception of the contract compliance program in 1941, both Democratic and Republican administrations have sought to strengthen its provisions. Only the Reagan administration had sought to weaken the enforcement or undermine the effectiveness of the Executive Order.

Indeed, in August of 1985, Attorney General Meese, Assistant Attorney General for Civil Rights Reynolds, and others, drafted and recommended that President Reagan sign a new Executive Order which would have effectively gutted the requirement of affirmative action for federal contractors.

The proposed new Executive Order would have:

1. removed the requirement that contractors set goals and timetables;
2. prohibited the federal government from considering statistical evidence of discrimination which would ordinarily be considered by a court in deciding whether a contractor is in violation of the law;
3. restricted the types of discrimination covered by the Executive Order program to cases of intentional discrimination where there is *direct* evidence of discrimination; and
4. discouraged federal contractors from undertaking voluntary efforts to improve employment opportunities for women and minorities that involved goals and timetables.[165]

Their efforts were forestalled by a coalition of business groups, civil rights organizations, and both Democrat and Republican members of Congress.[166] Among the members of Congress who requested that Reagan not go forward with a new executive order were then House Minority Leader Robert Michel and then Senate Majority Leader Robert Dole.

E. OFCCP Performance

By the end of the Carter administration, OFCCP had developed an enforcement structure with the potential for investigating and resolving charges of discrimination against women and minorities who were employed by federal contractors.

In 1980, over 4,000 persons were awarded nearly $9.3 million in back pay through an increased number of conciliation agreements and the use of sanctions; 391 "affected class" cases were being handled.[167] The number of investigations, cases and administrative procedures initiated, and the amount of relief obtained are all important measures of the strength of OFCCP's enforcement program. By any measure, after President Reagan took office, enforcement was substantially weakened.

In 1982, only 1,133 individuals received back pay, down from 4,754 persons in 1981; the total dollar amount of back pay for that period was $2.1 million, down from $5.1 million in 1981. The trend in the amount of back pay, and number of people who received it, fluctuated between 1983 and 1988. The back pay amount dipped to as low as $.9 million paid to 499 individuals in 1986, and climbed to $8.7 million awarded in 1988. Although the 1988 amount represents a substantial improvement from 1986, it is still lower than the amount awarded in 1980.

No "affected class" cases were filed between 1982 and 1985, when 55 such cases were filed. In 1986, 1987, and 1988, 46, 89, and 81 "affected class" cases were filed, respectively.[168]

Although the agency completed a record number of compliance reviews, they were perfunctory and incomplete. Similarly, the number of administrative complaints filed by the agency went from 53 filed in fiscal year 1980 to 5 in fiscal year 1987. The ultimate sanction, debarment, was used a total of *four* times in the eight years of the Reagan administration, compared to thirteen debarments during the four years of the Carter administration.[169] OFCCP did not institute enforcement actions in a timely fashion, which meant that cases were often closed without remedying EEO violations. Where violations were identified during compliance reviews, OFCCP did not monitor the actions of the contractors so as to ensure that violations were remedied. Nor did OFCCP process appeals in a timely fashion.[170]

F. OFCCP Administrative Litigation

The OFCCP may pursue administrative enforcement proceedings against federal contractors through the Solicitor of Labor.[171] The Reagan administration chose not to spend the bulk of resources in initiating such litigation; however, the Reagan Department of Labor was involved in a case filed in the previous administration. The number of cases referred to the Solicitor of Labor for enforcement decline from 269 in 1980 to 22 in 1986.

In 1977, the Department of the Treasury filed a complaint against Harris Trust and Savings Bank in Chicago, Illinois, alleging that the bank promoted white males at a significantly higher rate than women and minorities with comparable qualifications, and was paying the white males more for comparable work. Women Employed, a women's rights advocacy group moved to intervene in 1978.[172] Following evidentiary hearings in 1979, an administrative law judge found that the bank maintained racially and sexually discriminating employment practices. The judge recommended debarment and an award of back pay of $12.2 million in addition to lost seniority and promotions. Each of the parties filed exceptions to the recommended decision, and in May 1983, then Secretary of Labor, Raymond Donovan, remanded the case in order to hear previously excluded statistical evidence from the bank. The government dropped its request for debarment during the remand proceedings. Following a remand hearing held in November 1985 and January 1986, the chief administrative law judge upheld the original decision, noting that "race and sex discrimination were part of Harris' standard operating procedures." The judge subsequently ordered classwide rather than individual back pay relief. In January 1989 the case was settled, and Harris Bank, while not admitting liability, agreed to pay $14 million dollars in back pay, provide training to enable women and minorities to advance, and adjust its affirmative action plan so as to eliminate the present effects of past disparate treatment.[173]

Harris Bank is a vivid example of the potential of Executive Order 11246, as amended, to eradicate discrimination and is also an example of the ongoing need for the *federal government* to use its resources in challenging institutional discrimination. The case took 14 years to resolve; individual women and minorities simply do not have the time, money, and patience to mount such a sustained effort against recalcitrant employers. The presence of Women Employed as an intervenor insured that the federal government lived up to its responsibilities. The former Solicitor of the Department of Labor, George Salem, hailed the *Harris Bank* case as a "major civil rights victory for the federal government."[174]

F. Recommendations for Office of Federal Contract Compliance Programs

1. *Agency Leadership*

As with the Equal Employment Opportunity Commission and the Department of Justice, it is crucial that the individuals who are responsible for the Office of Federal Contract Compliance Programs have the requisite experience and demonstrated commitment to the enforcement of the anti-discrimination laws.

2. *Enforcement Policies*

The Solicitor of Labor should be integrally involved at the earliest stages in the investigation of complaints in order to advise on the structure of the case and facilitate settlement where appropriate.

The OFCCP should return to the strategy of targeting industries for special investigations,[175] by using "strike forces" made up of investigative staff and representatives from the office of the Solicitor of Labor.[176]

The agency should conduct compliance reviews that include, among other things, on-site visits, interviews with employees, and notice to interested community organizations.

Similarly, the emphasis in enforcement should be shifted from quantity of investigations to quality. Staff performance standards should not be premised on the percentage of complaint investigations or compliance reviews completed.

The National Self-Monitoring Reporting System should be eliminated; there should be no multiyear exemptions from affirmative action requirements.

3. *Regulatory Policy*

The following regulatory changes should be among those considered by OFCCP:

a. Reconsidering the threshold requirements for coverage by the Executive Order

b. Clarification of "availability"

c. Clarification of "underutilization"

d. Ensuring that "good faith" efforts in affirmative action include the provision of support systems which acknowledge work and family responsibilities

e. Provisions for classwide relief in back pay determinations, instead of focusing only on individual victims of discrimination

f. Development of criteria for use of multiplant affirmative action plans

g. Permitting the filing of third-party complaints *without* the requirement of naming identifiable victims of discrimination

h. Revising the goal of 6.9 percent for women in the construction trades and establishing such goals on individual crafts rather than on an industrywide basis.

VI. Summary and Recommendations

First, and foremost, the president must--in a major public speech during the early months of his presidency--make a clear and forthright commitment to enforce this nation's antidiscrimination laws. The administration should publicly repudiate the EEO policies and practices of the Reagan administration.

Sufficient funds to implement an effective enforcement policy must be available. Substantial increases in the budgets of the civil rights enforcement agencies should be sought in order to restore their former strength and effectiveness and to expand their capacity to pursue challenge patterns and practices of systemic discrimination.

The federal government must commit itself to a full employment policy. Some training will be required for workers to fill the service-sector jobs that will predominate in the year 2000. Federal enforcement agencies should incorporate creative training programs into affirmative action programs and other remedies for discrimination by public and private sector employers.

Federal enforcement agencies should foster an exchange of ideas and expertise between top governmental EEO policymakers and advocacy organizations. Further, policy proposals should be proffered in ways to facilitate the input of the public. While there will not always be agreement on policy initiatives, regular exchanges of ideas will establish the trust and cooperation to achieve mutual objectives.

Executive Order 12067, promulgated to facilitate the development of strong, consistent and effective enforcement policies, gave the EEOC lead responsibility for reviewing and approving such policies. EEOC's authority under 12067 should be reaffirmed by the president. In keeping with that responsibility, the EEOC must develop a clear and comprehensive strategy for eliminating the obstacles, including the lack of training and educational opportunities and the need for support services such as childcare and family leave which women and minorities confront when they enter and advance within the workforce.

Federal enforcement agencies must clearly and unequivocally support fair and effective remedies, such as the use of goals and timetables.

A. Enforcement and Litigation

Agencies enforcing antidiscrimination laws should target industries which offer minorities and women the greatest opportunity for hiring and promotion.

Agencies should commit to litigate cases that have the greatest promise of eliminating discriminatory policies and practices on an industrywide basis.

Agencies should focus their litigation strategies on the following substantive issues that are of particular concern to women and minorities:

1. gender- and race-based wage discrimination
2. multiple discrimination against women of color, older women and handicapped women
3. policies that discriminate and limit job opportunities on the basis of English-language proficiency
4. pregnancy discrimination
5. policies that have a disparate impact on minorities: for example, written tests that have an adverse impact on blacks or Hispanics; strength and agility guidelines that have an adverse impact on women
6. Race and sex based stereotypes, in which women and minorities face a "glass ceiling" which limits promotion opportunities
7. sexual harassment.

B. Agency Coordination Efforts

All Cabinet level departments and agencies, in addition to the Justice Department's Civil Rights Division, the Office of Federal Contract Compliance Programs in the Department of Labor and the Equal Employment Opportunity Commission, should coordinate enforcement strategies to be implemented in discrete geographic areas, industries, and occupations, where sex and race discrimination in employment are most egregious. For example, the responsibility of the Department of Housing and Urban Affairs to insure fair housing should be used to provide safe and affordable housing to women and minorities in residential areas adjacent to the plants and industries that have been targeted for enforcement by the EEOC, the Department of Justice, and the OFCCP. The Department of Transportation should be consulted and its expertise utilized. It will be counterproductive and shortsighted to expend resources to desegregate jobs and make employment opportunities available for women and minorities if the jobs are inaccessible because of the high cost of housing or the unavailability of affordable public transportation.

Similarly, the Department of Education's Office for Civil Rights should be asked to investigate complaints or conduct compliance reviews of public schools and universities to insure that the children of newly-hired or -promoted women and minorities receive equal educational opportunities. Federal job training resources should supplement available vocational education programs so that women and minorities attain the skills needed to enter the job market.

C. New Legislation

The administration should support and Congress enact new legislation to:

a. provide family and medical leave that guarantees job security to workers who must take leave to care for their families or for reasons of their own health;

b. provide an efficient and effective administrative process to adjudicate claims of employment discrimination of federal workers and applicants under Title VII;

c. give the EEOC authority both to require affirmative action plans from individual agencies, and to enforce the requirement should agencies fail to meet their obligation;

d. provide affordable day care for children that is safe and provides parents the opportunity to work productively without worry;

e. raise the minimum wage;

f. ensure pay equity within the federal government.

VII. Conclusion

The wholesale assault on settled principles of law and well-established policy conducted by the Department of Justice, the Equal Employment Opportunity Commission, and the office of Federal Contract Compliance Programs, for eight years, has resulted in protracted litigation and the expenditure of enormous governmental resources. Unfortunately, the Bush Administration has inherited the remnants of agencies; the immediate issue is how to revitalize these agencies.

By becoming a model employer and adopting policies that are creative and fair, the federal government is in a unique position to influence the direction of all employment practices, public as well as private. Such policies need to take into account that many workers have family responsibilities, and their ability to respond to the needs of their children will ultimately affect the quality of the future workforce. Our nation's economic security is premised on being a nation where equality of opportunity is a reality.

"Only a society with an eroded ethical base would allow more than a fifth of its children to live in abject poverty in the midst of the greatest affluence the world has ever known and to have the audacity to think it does not and will not affect us all."[3]

CHAPTER XV

THE GROWING INACCESSIBILITY TO PRENATAL CARE FOR POOR AND MINORITY WOMEN: A CRUCIAL PROBLEM FOR MAKERS OF NATIONAL HEALTH POLICY

by David Orentlicher, M.D., J.D. [1]
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I. Introduction

Until the early 1980s, the United States had made considerable progress in combating infant mortality and low birthweight, particularly among blacks and other minorities. Indeed, in the years between 1965 and 1980, our infant mortality rate had dropped almost 50 percent.[4] The impressive improvements in infant health have been widely attributed to the adoption of social programs, such as the Medicaid program, in the late sixties. These programs greatly reduced socioeconomic status as a barrier to health care and other necessities. In particular, these programs were instrumental in narrowing the gap which exists between the health of white and black babies at birth.

In 1980, however, the quality of infant health in the United States stopped improving and may be stabilizing. Although the infant mortality rate overall is still declining, the rate of decrease has slowed considerably. As a result, the American infant mortality rate is worse than those in sixteen of the other major, industrialized countries.[5] The same trends have occurred in the number of babies born at low birthweights. Moreover, the statistics regarding infant health for blacks are far worse than for whites.

The abrupt deterioration in infant health has been associated with, and almost certainly caused by, two important developments in health care: the drastic cuts in federal health spending which occurred in the early 1980s and negative trends in the number of pregnant women who receive adequate prenatal health care.[6]

In 1981 the Reagan administration slashed federal spending for the poor as part of an overall effort to stimulate the economy. Federal health spending did not escape the drastic reductions inflicted on other parts of the budget. In fact, because medical costs are rising at disproportionately higher rates than inflation, the health budget was a primary target for spending reductions. Unfortunately, despite legislative efforts by Congress to improve access to prenatal care for poor women since then, the rate of improvement for infant mortality and low birthweight is still slowing.

Even before the cuts in Medicaid and other federal health programs were made, the American system of health care was fragmented and unequal in terms of the care afforded to those who were poor or of lower income. The Medicaid program, the largest source of medical care coverage for those who do not have access to private health insurance, never attained its original goal of providing all poor Americans with health insurance. At present, the Medicaid program "has offered medical benefits to only a fraction of the people below the poverty line, and its benefits have been distributed in a pattern that was neither wholly rational nor fully understood."[7]

Since the funding cuts in the early 1980s, the gaps in the medical care system for the disadvantaged have only grown wider. The number of people the Medicaid program covers has shrunk while the number of people in poverty, and without insurance, has grown.

Like all medical services, prenatal care for women became less accessible in the early eighties, due to the cuts in health care funds and the growing number of people without the means to pay for any sort of medical care.[8] The health of pregnant women and infants in the United States has deteriorated considerably since these cuts were implemented. The number of women who obtain prenatal care has stopped increasing, the number of babies born with low birthweights has stopped decreasing, and the decline in our infant mortality rate has slowed dramatically.

Since 1984, Congress has legislated several expansions of Medicaid coverage specifically targeted at pregnant women. However, removing the financial barriers to care which were a result of the 1981 budget cuts has not been enough to rectify the problem.

This should be a warning signal to those who would propose any further cuts in funds for health care for pregnant women in order to solve the present-day budget crunch. Reducing the number of women who have access to prenatal care is a particularly foolish endeavor in these times of budget reductions, because providing prenatal care to women is a cost-reducing proposition. For every dollar spent on prenatal care, which insures delivery of a healthy baby, a greater amount is saved than would be spent on an unhealthy baby in the future. In addition, regardless of cost, use of prenatal care results in healthier babies and children overall. This, even were it not a cost-effective proposition, is a most humane and admirable goal.

By cutting funding for Medicaid and other federal health programs, and by blocking possible avenues for innovative solutions to the problems of access to care, we sacrifice long-term savings for immediate, short-term reductions in federal spending. Cuts in spending, which invariably garner immediate political success, are often made without thought to the long-term financial consequences they will engender. Current trends in access to prenatal care indicate that innovative and multi-faceted initiatives are needed to improve the access to care for all women in our country. Unfortunately, under the current monetary constraints precipitated by the budget deficit, the temptation to cut funding or block the creation of new programs to improve the utilization of prenatal care services is great.

The poor were the hardest hit with Reagan's budget cuts. Consequently, the adverse effects of the health budget cuts have a disproportionately negative result for minorities, since greater percentages of minority families are living near or below the poverty line.[9] In 1980, the infant mortality rate for blacks was roughly twice that of whites. Since 1980, the number of black women who have received proper prenatal care has declined,[10] and the number of infant deaths in certain birthweight categories for blacks has risen.[11]

From the perspective of a nation that would leave a healthy society for future generations, allowing impediments to proper prenatal care, in a formula based on one's income or the color of one's skin, is irresponsible and shortsighted. From the perspective of a society which strives for equality for all of its citizens, it is inexcusable. Such policies only serve to further fortify the barriers many minorities face in this society. Contributing to the division of society along racial lines can only hurt our prospects for having a healthy, prosperous future. Most importantly, to enact and maintain such policies, when cost-saving and relatively simple alternatives exist, is unjustifiable.

There is growing sentiment among members of the health and social services communities that the federal government is not doing all it can to rectify racial and social inequality. Certainly, in terms of the access that most poor and minority women have to prenatal care, this is true. Federal initiatives which would guarantee that all women had access to care would save everyone money. More importantly, however, it would guarantee that no baby dies or is impaired because of preventable causes.

> *"Nothing is so tragic as the unnecessary death of a baby or the birth of an infant handicapped for life by preventable causes."*[12]

II. Overview of the Problem

A. The Importance of Prenatal Care

1. Prenatal Care is Critical to the Health of an Infant.

"Low birthweight" is the leading cause of infant mortality and disability.[13] It is defined as occurring when an infant weighs less than 2,500 grams at birth,[14] and it has a wide variety of causes. Low birthweight may result if the pregnant woman suffers from malnutrition or a preexisting medical illness such as hypertension. It may also be caused by infections, x-rays, medications, cigarettes, alcohol, or illicit drugs.[15] Infants who have a low birthweight develop a host of medical problems; they are far more likely to die or become disabled than infants of normal birthweight.

As discussed below, studies have repeatedly demonstrated that inadequate prenatal care is a leading cause of low birthweight in infants. Consequently, the provision of proper prenatal care to all pregnant women would prevent more childhood deaths and handicaps than any other health measure.

a. Inadequate Prenatal Care Is A Leading Cause Of Low Birthweight In Infants.

Pregnant women who receive inadequate prenatal care have a sharply increased risk of delivering a baby who has a low birthweight. In 1985, for example, the National Center for Health Statistics reported that, for women who had no prenatal care, the low birthweight rate was 18.9 percent. In contrast, the low birthweight rate for all women was 6.8 percent.[16] Similarly, the March of Dimes Birth Defects Foundation has found that a woman who has thirteen to fourteen visits to a clinic for prenatal care has a 2 percent chance of having a low birthweight baby. However, a woman with no prenatal care visits has over a 9 percent risk of having a low birthweight baby.[17]

b. Low Birthweight Results In A Host Of Medical Problems.

The medical complications of low birthweight are staggering. In particular, low birthweight is the primary cause of infant mortality.[18] According to recent studies, babies born with low birthweight have a forty times greater chance of dying in their first month of life than infants of normal birthweight.[19] Moreover, the mortality rate in the first year of life is two hundred times greater for babies of very low birthweight[20] than for normal birthweight infants.[21] Consequently, while only 6.8 percent of all infants have a low birthweight, they account for 60 percent of the deaths that occur to infants during the first year of life.[22]

As the primary cause of infant mortality, low birthweight is also generally the leading cause of premature death. This is because more people die during their first year of life than in the next fifty years of life combined.[23]

Low birthweight also sharply increases the risk of permanent disabilities. Low birthweight babies are ten times more likely to have cerebral palsy than normal birthweight babies, and five times more likely to be mentally retarded.[24] They have a much greater risk of blindness, deafness, seizures, emotional disturbances, and social maladjustment.[25]

In short, as the Office of Technology Assessment concluded, in its comprehensive study of the health status of America's children, "low birthweight so overwhelms other health problems of early childhood that it can't be ignored."[26]

2. *Adequate Prenatal Care Can Prevent Low Birthweight.*

A large percentage of low birthweight is preventable if a pregnant woman has sufficient or adequate prenatal care.[27] It has been estimated that 75 to 80 percent of the health risks that are associated with low birthweight could be detected, and preventive treatment initiated, in the first prenatal visit.[28] There is also abundant evidence that investing money in prenatal care can avoid the substantial intensive care costs associated with treating low birthweight infants.

Several states have implemented their own programs to improve both access to prenatal care and maternal health in general. The success that these programs have had in substantially reducing low birthweidht is indicative of the positive correlation between adequate prenatal care and healthy infants. For example, in the first year of California's Obstetrical Access Program, low birthweight rates were 33 percent lower among women in the program than among mothers who did not participate in the project.[29] In addition, prenatal care programs have reduced the risk of abnormal physical or mental development in infants by two or three times.[30]

3. *Prenatal Care Is a Cost-Effective Way to Reduce Low Birthweight.*

Not only is adequate prenatal care successful in reducing low birthweight, and, by extension, infant mortality and disability, but supplying adequate care to pregnant women before delivery is considerably more cost effective than providing medical care to low birthweight infants after birth. Almost all of the relevant studies have concluded that money invested prenatally provides substantial savings over the postnatal care costs that the treatment of preventable birth defects requires.

The General Accounting Office estimated that in 1985, 2.4 to 3.3 billion dollars were spent on neonatal intensive care, the largest part of which went to the care of low birthweight infants.[31] The average cost per day of taking care of an infant in neonatal intensive care was $1,000 per low birthweight infant. The average total cost per infant was over $14,000.[32] In that same year, the average Medicaid reimbursement for prenatal care was $400.[33] The United States Office of Technology Assessment estimated that:

> for every low-birthweight birth averted by earlier or more frequent prenatal care, the U.S. health care system saves between $14,000 and $30,000 in newborn hospitalization, rehospitalizations in the first year,[34] and long-term health care costs associated with low birthweight.[35]

Indeed, after instituting a mandatory maternal education program and urging its employees to consult a physician early in their pregnancy, the Sunbeam Company saw its average medical costs per maternity at one factory drop from $27,242 to below $3,000.[36]

The Office of Technology Assessment further ascertained that if all women whose incomes are currently below the poverty level were made eligible for Medicaid coverage for prenatal care, the low birthweight rate among those women would have to decline only 0.07 to .20 percent in order for health care costs to break even. The Office of Technology Assessment considers such reductions "quite feasible."[37]

A study which examined the birth records for more than 31,000 babies born at California Kaiser-Permanente hospitals in 1978 concluded that even if pregnant women were provided with monetary incentives to utilize the prenatal care provided by the Kaiser HMO plan, Kaiser would still realize a savings of at least 4 million dollars in averted neonatal intensive care and first year rehospitalization costs.[38]

The conclusion to be drawn here is very simple: ensuring that all women have access to adequate prenatal care is a cost-effective way to reduce low birthweight and infant mortality and disability. Because the health of infants and children is an important determining factor in the future overall health of a nation, investment in prenatal care is a practical and effective way to further everybody's interests. However, there is increasing concern among groups monitoring the cultural and social status of America's children that future generations will be increasingly ill-equipped to shoulder the responsibilities and burdens that accompany running a nation.[39] An investment in prenatal care would not entirely solve this problem; yet it is one very important way in which these negative trends could be counteracted.

III. Infant Mortality and the Accessibility to Prenatal Care for Women in the United States.

> "Infant mortality . . . is considered among the most sensitive indicators of the nation's health status"[40]

A. The United States Has Very High Rates of Infant Mortality and Low Birthweight Births.

Relative to other industrialized countries, our infant mortality rate is embarrassingly high. This fact becomes tragic when one considers that our per capita income ranks third among major industrialized countries.[41] The United States in no way lacks the proper technology, resources, or materials needed to further reduce the infant mortality rate. The Office of Technology Assessment has observed that the infant mortality rate "tends to be closely associated with access to food, shelter, education, sanitation, and health care."[42] Therefore, in the case of the United States, such a high infant mortality rate indicates a large disparity in the degree of access to such necessities between different segments of society.

In 1985, the most recent year for which there are country-specific infant mortality statistics, the United States' infant mortality rate was seventeenth[43] among the major industrialized states.[44] The United States ranked below Spain, East Germany, and Australia, and only slightly ahead of Italy. Our infant mortality rate is twice that of Japan.

The low ranking of the United States reflects a much greater emphasis placed by other countries on prenatal care. As the Institute of Medicine has noted, "[M]any other countries (particularly Japan and most Western European countries) provide prenatal care to pregnant women as a form of social investment, with minimal barriers of preconditions in place. As a consequence, very high proportions of women in these countries begin prenatal care early in pregnancy."[45]

The poor quality of infant health in the United States falls heavily upon blacks. When our infant mortality rate is broken down into categories according to race, a considerable disparity between the infant mortality rates of blacks and whites becomes evident. Infant mortality among blacks is twice the rate for whites. In 1985, the number of infant deaths among whites per one thousand births was 9.3, while the number for black infants was 18.2.[46] Indeed, if our international standing for infant mortality were calculated according to black infant deaths only, our mortality rate would place us twenty-eighth instead of seventeenth among the industrialized countries.[47] In some areas of the country, that is, in those of high poverty rates, our infant mortality rate rivals that of some Third World nations. The infant mortality rate in the District of Columbia, for instance, is 24.3.[48] This is higher than the infant mortality rates in Jamaica, Chile, and Paraguay.[49] The poverty rates for blacks supports the OTA's assertion that poverty and infant mortality go hand in hand: in 1986, 42.7 percent of black infants were born into poverty, as opposed to 15.3 percent of white infants.[50]

Predictably, the United States also places poorly in terms of birthweight rates. In 1980, we ranked fourteenth among industrialized nations in the percentage of live births that were low birthweight, and fifteenth for those that were of very low birthweight.[51] Our relatively low standing among other nations in regard to low birthweight is not a problem confined to the infant stages. Low birthweight contributes to several other lifelong maladies.[52] In 1979, recognizing the reduction of high infant mortality rates as a crucial goal for the nation, the Surgeon General issued guidelines for increasing the percentages of women who receive adequate prenatal care. Originally, the goal was for 90 percent of pregnant women to have access to early prenatal care by 1990.[53] If projections based on present statistics are correct, not only will the United States not achieve this goal, but neither will forty-nine of the fifty states in the Union.[54] In fact, in terms of reaching the 1990 target, many states have prenatal care use rates which are headed in the wrong direction.[55]

B. The Background of the Worsening of Infant Mortality and Low Birthweight Rates in the United States.

1. The United States Made Significant Progress in Reducing Infant Mortality and Low Birthweight and Expanding Prenatal Care Use Until 1980.

Up until 1980-81, the United States had made considerable progress in reducing infant mortality, reducing low birthweight, and expanding access to prenatal care for pregnant women. However, our track record since 1980 can only be described as dismal. While the number of mortalities has continued to decline, the rate at which it has declined has slowed dramatically from 1980 to the present.[56] The Office of Technology Assessment has estimated that, had the infant mortality rate continued to decline according to pre-1980 numbers, 2,630 less infants would have died in 1985 than actually did.[57] The year 1983 also marked the greatest disparity between black and white infant mortality rates since 1940.[58] Black babies are now twice as likely to die within the first year of life as white babies.

There will often be variations in the infant mortality decline rates from year-to-year which are either statistically insignificant or which represent nontrend variations. However, the drop in the rate of decline for infant mortality which occurred abruptly after 1980 was profound. Upon analyzing the above statistics, the Office of Technology commented:

> Since 1981, there has been a substantial,unprecedented, and statistically significant slowdown in the rate of improvement in U.S. infant mortality rates. . . . Although year-to-year fluctuations in reported infant mortality rates are expected, the recent slowdown in improvement of U.S. infant mortality rates cannot be dismissed as random variation around the trend.[59]

Moreover, the trends in the national infant mortality statistics have been broadly based, affecting the individual states generally.[60]

An increase in neonatal mortality and in the number of premature births has accompanied the worsening of infant mortality since 1980.[61] Neonatal mortality, which is generally regarded as being largely a function of maternal health status,[62] increased 3 percent between 1980 and 1983. For blacks, the increase was 5 percent. This was the first time in 18 years that such increases occurred.[63]

2. The Worsening of Infant Mortality and Low Birthweight After 1980 Was Accompanied By a Slowdown in the Expansion of Prenatal Care Use.

Not surprisingly, these disheartening trends in infant mortality and neonatal mortality have been accompanied by a general slowdown in the rate of the use of prenatal care for pregnant women. Again, the change occurred in the early 1980s. From 1969 to 1980, the percentage of babies born to women who received early prenatal care[64] increased 8.3 percentage points (from 68.0 percent to 76.3 percent). Since 1980, however, that percentage has declined for blacks and remained stable for whites.[65] The data for the years spanning 1980-1985 show that, the number born to black women receiving early care has dropped almost 1 percent, while the number born to white women receiving early prenatal care rose only one tenth of one percent. In that same time period (1980-1985), the number of women who received either inadequate or no prenatal care actually increased.[66] Again, prenatal care for black women suffered the most: in 1980, 8.8 percent of black babies were born to women who received no care or inadequate care. By 1985, that number had jumped to 10.0 percent.[67] The Institute of Medicine, which has labeled this trend "troubling," also commented that "[i]n fact, 1985 rates of late or no prenatal care for black women are about the same as those recorded in 1976; improvements have, in effect, been erased."[68]

IV. The Connection Between the Alarming Decline In Infant Health In the Early Eighties and the Reagan Administration's Cuts In Federal Health Funds.

The general decline in the quality of prenatal care and the worsening of infant mortality rates that occurred in the early 1980s was predictable. Soon after taking office, President Reagan requested, and Congress granted, a series of large cuts in the federal budget. These cuts reached deep into the federal health budget, and eliminated medical assistance to over a million needy people.[70] When the adverse effects of the cuts on infant mortality and birthweight became evident in early 1984, Reagan administration officials claimed that it was still too early to conclude that the negative numbers represented a trend.[71] It is now obvious that the decline in infant health was not simply a slight fluctuation in the statistics. As was mentioned above, the decline in the infant mortality rate has slowed significantly and the number of low birthweight babies is up.

A. There Has Been a Significant Decline in the Access of Pregnant Women to Prenatal Care.

1. How Low Income and Lack of Health Insurance Affects Prenatal Care Use Rates.

To understand the declining trends in infant health, it is important to examine the effect that poverty, low income, and lack of health insurance have on rates of utilization of prenatal care services. While income and amount of financial assistance are not the only factors affecting care rates, they are highly determinative of the extent that a woman receives proper care. Because poverty "is one of the most important factors consistently associated with insufficient prenatal care,"[72] it is not surprising that in the early 1980s, when funds were cut for all health needs and the percentage of people below the poverty line increased, the number of women receiving adequate prenatal care dropped.

There is conclusive evidence that women who are of low income, but who are not covered by Medicaid or other health insurance programs, tend to receive prenatal care later and less frequently than women with health insurance. For these uninsured women, lack of financial support to cover medical expenses seems to be a leading, and perhaps the primary, reason for their failure to receive prenatal care earlier or more frequently.

From June 1986 to June 1987, the United States General Accounting Office (GAO) studied the prenatal care use rates of women who had differing levels of insurance.[73] The study included 1,157 women in thirty-two communities throughout eight states. In its study, the GAO found that women who were uninsured or insured by Medicaid were far less likely than women who were privately insured to begin care in their first trimester, and far more likely than privately insured women to delay care until the third trimester of their pregnancy. The following are the GAO's results:[74]

	% who began care in the firsttrimester	% who began care in the third trimester
Privately Insured Women:	81%	2%
Women Covered by Medicaid:	36% [75]	16%
Uninsured Women:	32%	24%

GAO study, June 1986 - June 1987

It is obvious that women who have the money to finance prenatal care are more likely to get early care, and that women with little financial support are the most likely to delay care. Of the uninsured or Medicaid-insured women surveyed, for example, 63 percent did not receive sufficient prenatal care.[76] A study reported in *Minnesota Medicine* documented similar findings with respect to the connection between the adequacy of prenatal care and payment source.[77] This study found that women with private insurance were likely to average 11.8 prenatal care visits during their pregnancy, as opposed to uninsured women, who averaged 7.9 visits. The study also determined that women who received adequate care had significantly larger and more physically mature infants.[78] Moreover, payment source alone accounted for 19 percent of the variances in birthweight and need for neonatal intensive care among the babies studied.[79]

For black women, the likelihood of receiving early or frequent care is substantially less than that of white women. The Institute of Medicine reports that black women are far less likely to get early care and twice as likely to get no care or inadequate care.[80] This is almost certainly linked to the fact that a high percentage of the black population lives under the poverty level.[81] It may also be because per Medicaid recipient, blacks receive a much smaller amount of benefits than do whites.[82] For Hispanic women, the numbers are even worse. Hispanic women are substantially less likely to get early care than white women, and three times more likely to get no care or inadequate care.[83]

Several studies, including the GAO study, have been conducted to identify the major barriers to receiving prenatal care.[84] The GAO report showed that it is primarily the lack of financial resources that impede uninsured women from getting prenatal care.[85] In that study, none of the uninsured women in one community who had access to a free clinic cited lack of money as a primary barrier to care, whereas 27 percent of uninsured women without the same access to free care in another community cited lack of money as a primary barrier to care.[86]

2. The Importance of Medicaid for Providing Health Insurance to Low Income Women.

The Medicaid program is the single most comprehensive provider of health services to the poor in this country. It is by far the biggest and most important health care program for poor pregnant women. Moreover, it has been documented that Medicaid reduces the influence of socioeconomic status as a factor for determining who receives health care.[87] This follows from the fact that uninsuredness, and the financial inability to pay for medical care which accompanies it, is one of the primary obstacles to adequate prenatal care for women. Without medical insurance, the high costs of medical care preclude even reasonably well-off people from receiving care, as well as those who hover near the poverty level. Not surprisingly, then, the Children's Defense Fund reports that at least one study has linked neonatal mortality rates with individual states' Medicaid policies.[88]

The Medicaid program provides a range of health care services to those people who satisfy certain income and resource eligibility requirements. Medicaid is funded by the individual states and the federal government through a matching funds arrangement. The federal government has mandated that a certain category of people, that is, the "categorically needy," must be covered by all states, and all states must provide a minimum number of medical services to people who fall into this category.[89] All people who are eligible for Aid to Families with Dependent Children (AFDC), a cash assistance program, fall into this category. However, each state sets its own eligibility level for AFDC.[90] In some states the income eligibility threshold is less than 20 percent of the poverty level.[91] It is less than 50 percent of the poverty level in half of the states.[92] In states which choose not to cover other, optional categories of people, eligibility for AFDC can be the sole determining factor for Medicaid eligibility. In short, it is the individual states that largely determine who is categorically needy and therefore who automatically receives Medicaid benefits.

There is a second class of indigent people, the "medically needy," who are not necessarily eligible for Medicaid benefits, but who receive aid at the discretion of the states.[93] These are people who, because of their income or other circumstances, do not qualify for assistance outright, but who would, because of incurred medical expenses, fall below the regular eligibility level for aid.[94] Beyond this, states have considerable discretion in deciding who may, or may not, qualify for Medicaid. They may pick from a range of "optional" eligibility groups for coverage.

Although, in general, the Medicaid program has been available to a shrinking percentage[95] of the poor population in this country, the assistance it provides is critical. For many people, Medicaid is their only source of health insurance. In a society such as ours in which medical costs have skyrocketed, lack of health insurance precludes access to medical care. For pregnant women in need of prenatal care, Medicaid is often a last or only resort.

Because uninsuredness is such a great problem for women seeking prenatal care, it is easy to understand why the drastic health budget cuts made in the early 1980s resulted in a deterioration of infant health.[96] Cuts in Medicaid reduced eligibility, thus severing many women from access to health insurance. At the same time, almost all other potential sources of aid for pregnant women were being drastically reduced. However, President Reagan's budget cutbacks were not simply reductions in funds; indeed, the President presided over both a philosophical and structural transformation in the funding of prenatal health.

B. The Reagan Administration's Cuts in Health Care Spending and Their Consequences for Access to Prenatal Care.

Originally, the Reagan budget cutbacks in domestic social spending were portrayed as necessary "belt-tightening" for the health of our national economy. All reductions in funding for programs which aid the poor and needy were made with the assurance that those cuts would not allow the programs to drop below a certain "safety net" level. The Reagan administration maintained that, although the growth of social programs would be limited, no one who was truly needy would be left without assistance.[97]

However, the funding reductions in the federal health budget had a serious impact on the Medicaid program, and, by extension, the availability of health insurance for poor and near poor women. Indeed, the President's promise to maintain a "safety net" for the most needy in our society became questionable in view of the financial and structural surgery performed on Medicaid and other federal health programs. President Reagan accomplished this surgery in two ways. First, he made straight funding cuts in the federal health budget. Second, he increased the discretion that each state had over determining eligibility for Medicaid and other health care funding. Individual states, already strapped for health care funds of their own, were forced to cut eligibility and eliminate many optional services.

1. The Effects of Reductions in Medicaid and Other Health Care Programs.

The cuts that President Reagan proposed and received from Congress for the Medicaid budget were substantial. Under the Omnibus Budget Reconciliation Act of 1981, Congress approved the President's proposal to cut over $1 billion from the Medicaid budget for fiscal year 1982.[98] Later, in his budget proposal for fiscal year 1983, President Reagan planned to maintain Medicaid funding at the 1982 level.[99] This would have resulted in a de facto cut of $2 billion and would have been achieved by reducing eligibility, eliminating many "optional" medical services, and allowing states to require co-payments for certain benefits.[100] However, Congress balked at the scope of cuts Reagan was proposing for Medicaid: it settled on cutting $860 million from the Medicaid budget over the next three years and $275 million in fiscal year 1983.[101]

The impact of these reductions in terms of people affected was serious. As a result of the 1981 OBRA, one million people lost their eligibility for AFDC, and thus for Medicaid coverage.[102] Included in this number were 10 percent of mothers and children who received Medicaid and AFDC assistance.[103] By 1985, expenditures for Maternal and Child Health grants, Community Health Centers (which are often the only sources of medical services in many rural and urban areas), and other federal health programs had declined 32 percent in constant 1981 dollars.[104] The number of people below the poverty level who were covered by Medicaid had dropped from 65 percent in 1976 to 38 percent in 1984.[105]

It is important to bear in mind that these reductions in Medicaid funding occurred simultaneously with the sharpest rise in the poverty level since statistics were first recorded.[106] The number of infants born into poverty had grown from 18 percent in 1978 to 24 percent in 1984.[107] In short, as more people needed Medicaid, fewer people received it.

The Medicaid budget cuts cannot be justified on the basis of simply weeding out undeserving and fraudulent recipients.[108] Sara Rosenberg, Director of Child Health Division for the Children's Defense Fund, claimed that, as of 1984, not one single state had been able to ensure proper care for mothers and children living below the poverty level.[109] The levels for AFDC eligibility (which, until 1986, were the sole determinants of Medicaid eligibility for "categorically needy" recipients)[110] in the individual states bear out this assertion. Nationally, the average maximum income that a family of three may have and still qualify for AFDC benefits is currently 45 percent of the poverty level.[111] This means that a family whose combined yearly income is over $4,561 is not eligible for AFDC benefits or Medicaid. Some states have opted to cover families who are categorized as "medically needy." But even including those states who cover the "medically needy" category, the average maximum income for a family of three would be only 52 percent of the poverty level, or approximately $5,039 per year.[112]

A modification in Medicaid, which was proposed by President Reagan, and which exemplified the administration's approach toward funding problems, directed that a pregnant woman could receive AFDC benefits for prenatal care only when it had been "medically verified that the birth [would] be anticipated within three months."[113] In other words, prenatal care would be available only during the third trimester of the pregnancy. This eligibility requirement became law as a part of OBRA of 1981.[114] It "saved" the administration $23 million in 1981.[115]

In fact, the requirement increased costs while threatening the quality of infant health. As discussed above,[116] prenatal care is highly effective only if is initiated early in the woman's pregnancy. By the time a woman has reached her third trimester, "the greatest benefits from prenatal care and the impact of intervention has already passed."[117] Moreover, the studies on the cost-effectiveness of prenatal care[118] have shown that, for every dollar reduction in funds for prenatal care, there is a more than three dollar increase in costs for the complications of low birthweight.[119] Predictably, the OBRA eligibility requirement had an adverse impact on the numbers of women who received adequate prenatal care. In fact, it was not until 1984 that Congress changed the law so that a woman could be eligible for AFDC as soon as her pregnancy was medically verified.[120]

2. The Increase of State Financial and Administrative Responsibility for Medicaid and Other Health Care Programs.

In addition to cutting the amount of funds expended for Medicaid and other health programs for the poor, the president made structural changes in the various avenues for supplying these funds to recipients. The basic goal of those changes was to transfer financial and administrative responsibility for Medicaid and other such programs onto the individual states.[121]

Before 1981, the percentage of federal matching funds for the Medicaid program was calculated according to per capita income in the individual states.[122] In 1981, however, the president proposed placing a 5 percent cap on the amount the federal government could raise its Medicaid funding for 1982. Moreover, in subsequent years, Medicaid funding would rise only to keep pace with general price inflation.[123] Since the costs of the Medicaid program increase each year at rates higher than the nation's inflation rate,[124] this latter proposal would have forced the states to absorb extra costs.[125] Congress did not pass these proposals.[126] Instead, it authorized a series of deductions from the federal share of Medicaid costs over the next three years.[127] In the end, however, there were still reduced funds for each state.

Concurrent with the reduction in federal funding, states were also given greater leeway over which categories of people and services they would cover under Medicaid. Previously, states which had opted to provide coverage to those people categorized as "medically needy" were required to fund all people who fell into the "medically needy" category. As of OBRA 1981, states were given "almost complete discretion in determining the scope of coverage and the service to be offered"[128] for those who fell into the "medically needy" category. Moreover, they were given expanded discretion to define medically needy.[129] In general, states were given much broader leeway to experiment with alternative procedures for all aspects of Medicaid from reimbursement policies to eligibility. In addition, the Health Care Financing Administration (HCFA), which oversees Medicaid eligibility, has consistently interpreted the OBRA 1981 regulations as giving states "nearly unlimited discretion"[130] in deciding at what income level a person becomes medically needy and in interpreting several other eligibility requirements.[131]

President Reagan also cut costs and shifted the responsibility for some tough decision making onto the states by consolidating forty discrete health programs, each aimed at a particular group of people who require a specific kind of medical service,[132] into four large block grant programs. States now receive money in a large block and are to administer it as they see fit. Previous to 1981, each needy group was assured at least a minimum level of funding. Since the 1981 OBRA, however, many groups, most of whom are equally needy, must compete against each other for legislative attention on the state level. In addition to consolidating these forty programs into large blocks, the overall spending for the newly combined grants fell 25 percent.[133]

Health care for pregnant women fell under the auspices of the Maternal and Child Health Block Grant (MCH). MCH consolidated six different maternal and child health programs.[134] Because funding for MCH was cut, access to prenatal care for pregnant women naturally suffered. Moreover, the new funding method also means greater uncertainty concerning the exact amounts of money that will go directly to prenatal care from year to year. In short, the fate of prenatal care funding is subject to the discretion of each individual state legislature.

Unfortunately, in the years 1981-1982, state governments were just as economically strapped as was the federal government. The added discretion over the "optional" services provided by Medicaid meant that many states "experimented" with more restrictive eligibility requirements rather than with alternative ways to fund Medicaid or with alternative ways to cut costs without cutting people from the program. Professor Wing, of the University of North Carolina School of Public Health and School of Law, has commented:

> Viewed realistically, most state program policymakers will find that the only solution to the immediate dilemma posed by Medicaid that is acceptable . . . is a reduction in the overall size of their program by limiting program coverage, cutting eligibility, or adopting restrictive reimbursement policies which will effectively curtail . . . the availability of their medical services to the poor.[135]

Wing further observed that proposing alternative systems or structures which would directly address the overall problems with health care costs would be "complicated" and might not result immediately or obviously in the politically acceptable "'big dollar' savings" which eligibility cuts would produce.[136] For state legislatures, the most politically expedient way of resolving the Medicaid cost problem may be by cutting eligibility. However, with respect to access to prenatal care, this is neither practical in financial terms[137] nor in terms of preventing avoidable birth deficiencies.

Indeed, as of 1984, many states had made efforts to contain their medical care expenditures by restructuring Medicaid. Measures enacted by the states have included: 1) requiring co-payments; 2) limiting the number of days per hospital stay; 3) setting hospital reimbursement rates according to the primary diagnosis of a patient's problem, rather than by actual services rendered to treat the problem; and 4) by reducing eligibility.[138] States have implemented the system for setting rates according to diagnosis in spite of the fact that it has already been proven to "cause unwanted, even dangerous, results" when used for Medicare patients. Moreover, a number of studies has shown that cost-sharing does not contain costs, but it does lead to underutilization of medical services by the poor.[139]

Thus, by cutting funds for Medicaid while allowing states greater discretion over which people and services would be covered, the Reagan administration effectively undercut the availability of prenatal care to poor and minority women. Indeed, as discussed above, health statistics demonstrate that, soon after the health budget cuts were implemented in the early eighties, financial access to prenatal care declined and the gains in prenatal care and infant health have been halted or reversed. Fortunately, Congress, in 1988, mandated that *all* states must now provide Medicaid benefits to every pregnant woman whose income does not exceed 100 percent of the poverty level. While this will certainly begin to erode some financial barriers to obtaining prenatal care, it still does not address several of the other underlying problems with our health care system, problems which will continue to aggravate poor women's access to care in the future.

V. Other Circumstances Which Have Served to Restrict Access to Care for Pregnant Women and Children Since 1980.

In order to improve the percentages of all women who both have access to--and receive--prenatal care, it is critical to understand how other societal problems aggravate problems of access. While some of the problems associated with providing access to prenatal care have several obvious and cost-effective solutions, providing access to care for all women will remain a permanent struggle until all of the societal barriers to access are eliminated. Unfortunately, the lack of adequate prenatal care for many women is connected to the problem of rising costs plaguing the medical care system and related problems in the health insurance industry. The kinds of difficulties facing these industries are complex, and for the most part are in need of comprehensive and complicated solutions.

Equally unfortunate, the tendency in dealing with many of the problems with high costs has been to resort to across-the-board reductions in funds or the employment of relatively simplistic cost-cutting mechanisms which do not take into account potentially adverse consequences. For example, there is evidence that limiting certain categories of coverage provided by Medicaid leads people to delay care until health problems reach very serious or emergency levels. Treatment in such situations often costs considerably more than simple, low cost, preventive measures.[140] Thus, approaches to the problems of medical and health insurance costs require solutions which reach the root of the problem and address the structure of the health care system as a whole. Solutions which do not reach the root cause will only aggravate these problems, instead of remedying them.

A. Lack of Insurance Availability.

As was mentioned previously, lack of insurance is a critical factor in determining whether a pregnant woman receives adequate prenatal care. It is difficult to imagine how anyone but the wealthy can afford regular visits to a physician without some sort of health insurance coverage.

In 1988, thirty-seven million people, or about 15 percent of the total population in the United States, went without health insurance.[141] Over three-quarters of that total are either workers or the dependents of workers.[142] The high rate of uninsuredness is in large part due to the large numbers of people who lost employment during the recession in the early 1980s. Every 1 percent increase in the unemployment rate meant an additional eleven million people out of work.[143] Of the 60 percent of workers who subsequently found new employment, half took jobs in which their pay was cut and their health insurance considerably more limited than their previous employment.[144] Due to the high costs of supplying medical insurance to their employees, employers are increasingly cutting back on or refusing to offer benefits. Additionally the premiums for individual insurance coverage can be exorbitant, often precluding people who are unemployed or employed in low-paying jobs from obtaining any type of medical coverage. Unfortunately, the receding availability of employer-provided health insurance is coming at a time when Medicaid benefits have already been cut to the bone, leaving a considerable gap in the number of people whose incomes exceed Medicaid eligibility levels but who also do not have access to private insurance.

Women, particularly single women, and minorities are at greater risk of being uninsured. This is because women and minorities are more likely to be unemployed, to be employed part-time, to hold low-paying or seasonal jobs, or to be employed in industries considered poor risks for coverage by insurance companies.[145] In fact, in 1984, 17 percent of women who are of reproductive age had no health insurance.[146] In addition, 26 percent of women of reproductive age had no insurance to cover maternity care.[147] The fact that women and minorities are disproportionately among the uninsured in this country serves to underscore the fragmented nature of our social and medical assistance programs. Uninsuredness among minorities and women is a problem which cries out for a comprehensive federal solution in terms of coverage for prenatal care.

B. Public Hospitals Are Increasingly Unable to Provide Care to Poor, Uninsured, and Medicaid Insured People.

Uninsured people who need medical care often turn to charity or public hospitals to provide them with care. Yet public and teaching hospitals are finding it more and more difficult to treat needy people and survive financially. Currently, a relatively small percentage of hospitals are responsible for absorbing the costs of a high amount of charity care. In 1982, for example, hospitals provided $6.2 billion dollars in uncompensated care.[148] Teaching hospitals absorbed 36 percent of that uncompensated care,[149] although they provided only 27 percent of all care. Public hospitals provided 3 to 4 times the amount of uncompensated care that private hospitals did.[150] It should be noted, also, that the federal cuts in the Medicaid budget fell hardest on public hospitals and clinics. Reductions in funding affect these institutions more than other providers because "they typically have higher institutional costs than other facilities and serve more public beneficiaries."[151]

In addition to the high percentages of uncompensated care, high insurance premiums for malpractice result in a decreased hospital capacity to treat the growing number of those people who need care who are unable to pay for it. Hospitals, especially public and teaching hospitals, simply cannot absorb the costs. Many hospitals have begun to require preadmission deposits or proof of ability to pay from women before they are admitted for delivery. The result has been that many poor women who are uninsured must literally wait until they go into labor, and can be admitted to the hospital through the emergency room entrance.[152]

Many pregnant women have also fallen victim to "patient dumping," another unpleasant side effect of the crisis in medical costs and medical malpractice insurance costs. In increasing numbers across the country, patients who do not have proof of medical insurance who seek admittance to non-public hospitals are being "transferred" to public hospitals.[153] A report by the Committee on Government Operations in 1988 regarding patient dumping revealed that private hospitals were going to almost any lengths to avoid admitting patients who could not pay for their care, in spite of the fact that Congress had passed an anti-dumping law in 1986.[154] In many instances, patients were transferred while still in an unstable condition. In other instances, patients were simply denied care, regardless of the seriousness of their medical problems. The Committee found evidence of one hospital which transferred a pregnant girl to another hospital even though she arrived in its emergency room in the midst of labor with complications.[155]

Obviously, the high percentage of people nationwide who are not covered by health insurance has become critical in this age when one moderately serious illness or one hospitalization could financially devastate a family. The high number of uninsured women is of great concern in terms of access to prenatal care because uninsured women have the lowest rates of adequate care. In the end, society usually pays for the adverse results of that low rate of care in high neonatal intensive care and other costs.

C. Other Problems With The Medicaid Program Which May Impede Access to Prenatal Care.

At the same time that increasing numbers of people are falling below the poverty level and are without health insurance, Medicaid funds have been cut and eligibility has been reduced. However, it is not just the lack of funds or the reduction of eligibility which can create barriers to care. Those who are already covered by Medicaid face additional problems. Medicaid reimburses physicians and hospitals for their services at rates which are significantly lower than the fees normally charged.[156] The result is that many physicians do not see Medicaid patients, or at least limit the number they do treat. There is evidence that maternal-care providers are especially reluctant to participate in the Medicaid program. Besides low reimbursement rates, obstetricians and gynecologists (ob/gyns) have been saddled with some of the highest medical malpractice insurance premiums. As a consequence, many ob/gyns have left their specialty or medical practice altogether;[157] those who have remained in practice are likely to limit their acceptance of Medicaid patients because the reimbursement rates are not high enough to offset the costs of the required insurance premiums. Additionally, in the interest of avoiding malpractice suits, many ob/gyns have limited the number of high-risk patients they are willing to treat, and women on Medicaid tend to fall into the high-risk category.[158] All these factors work to substantially reduce the number of care providers available to treat those in need of prenatal care.

Besides a narrow pool of providers, there are bureaucratic obstacles in the path of pregnant women eligible for Medicaid. The average waiting period for determination of eligibility can often take a woman into her second trimester before her eligibility is established.[159] Also, because the pool of providers is limited, there is evidence that the waiting period before the first appointment can be scheduled can be quite lengthy.[160]

D. Nonfinancial Barriers to Prenatal Care for Poor and Minority Women.

Although one of the primary barriers to obtaining prenatal care is lack of financial resources to pay for care, it is by no means the only important barrier. Several other barriers exist which are also crucial determinants of the utilization of available care.

There are several barriers which are related to economic status. The first is lack of transportation to available care. This is often a function of both economic and geographic factors; women who live in rural areas or areas in which there is no prenatal care provider close by often lack transportation to available facilities.[161] The second may be lack of child care for older children during the time of the prenatal care visits. Also, some women may not be able to leave work or school during the times that care is available or for the necessary length of time that an appointment may take.[162]

Other barriers may be the attitudes of a particular woman toward the importance of health care or the importance of prenatal care. Many women may not place great value on prenatal care. Differences exist among the different cultures as to the importance of care. There are also women who may think prenatal care is not as important for pregnancies after their first or second. Research has also shown that an individual woman's attitude toward her pregnancy can also be determinative of how early or frequently she obtains care. For instance, if a pregnancy is unplanned, unwanted, or undetected, a woman may delay care because of reluctance to admit she is pregnant, uncertainty as to whether she plans to carry the pregnancy to term, or for psychological reasons.[163]

Special mention should be made of the problems of adolescent pregnancy. Pregnant teenagers are likely to encounter all the usual barriers to care, but must also confront some serious additional obstacles to obtaining care. Denial of, or ambivalence toward, a pregnancy can prevent an adolescent from seeking help. Reluctance to tell a parent usually only compounds the financial restrictions to access which may apply; few young women have the independent means to afford medical care on their own. Adolescents are also the most likely to be uninformed about sources of care, such as free clinics or other health services.[164]

There is also significant evidence that the relationship between low-income patients and their care provider may itself be a barrier to receiving proper care.[165] This is also true of other personnel who may work with or for care providers. Providers tend to discourage care when they are uncommunicative, do not explain procedures, hurry their patients, or are otherwise insensitive to a patient's needs. Possible reasons for adverse patient/provider relationships include cultural or racial prejudices or biases, the stigma often accorded charity or free care, or different cultural or socioeconomic attitudes toward the utilization of health care. There is also evidence that fear of hospitals, hospital procedures, providers, and medical care in general can be obstacles for women needing care.

One study of the possible barriers to care concluded that psychosocial barriers, such as attitudes toward care, reactions to attitudes of providers, lack of comfortable facilities, and so forth, could be "greater barriers to care than such external obstacles as lack of insurance or transportation problems."[166] Some of the studies reported by the Institute of Medicine noted that women who tended to receive no prenatal care were in general more peripherally linked to the health care system than other women.

This would seem to be supported by the fact that, for lower-income or uninsured women, care is more accessible and effective when it is delivered in a setting that provides more comprehensive services than most private, office-based care locations. Such places would include maternal health care clinics, school or public health department-based settings, and hospital outpatient departments. Such clinics usually provide care to Medicaid or uninsured women, which removes financial and other barriers to care for many women. Many women who are at risk for receiving no care need more assistance than simply prenatal care; they may need housing assistance or other social support services. The Institute of Medicine reports that the demand for such locations for care seems to be rising due to increasing uninsuredness for women of childbearing age. Unfortunately, the supply of such care settings is already too low to meet the demand for them.[167]

VI. Legislative Improvements in the Access to Care for Pregnant Women and Infants Since the Mid-1980s.

The correlation between budget cuts and the deterioration of infant health and mortality became evident as early as 1984.[168] Yet Reagan administration officials not only refused any responsibility for this deterioration, they also rejected a request by one of their own departments to study the troubling infant mortality and low birth-weight statistics which had begun to accumulate.[169] Indeed, despite the advice of the Assistant Secretary of Health and Human Services, HHS Secretary, Margaret Heckler, and Budget Director, David Stockman, said "that there was no evidence to link cutbacks in Medicaid, nutrition and maternal and child health programs with changes in the infant mortality statistics."[170] Alternative explanations for these changes by administration officials were also sparse.

Fortunately, Congress has recognized the serious nature of recent infant mortality and low birth-weight statistics. In the OBRAs and other budgetary actions subsequent to 1981, Congress has worked diligently to expand eligibility and prenatal services covered by Medicaid specifically for pregnant women.

A. Expansions in Eligibility.

Congress has gradually expanded the Medicaid coverage that states are required to provide pregnant women since 1984. By July 1, 1990, all states must provide any pregnant woman, whose family income does not exceed 100 percent of the poverty level, with Medicaid coverage. Coverage begins from the time her pregnancy is verified, rather than after the baby is born. This eligibility requirement must be extended to *all* women; states may not impose restrictions tied to family composition (*i.e.*, only women living in a one-parent household may qualify) or employment status. Additionally, Congress has given states the option to cover pregnant women whose incomes were up to 185 percent of the poverty level. Congress also mandated that any state which chose to cover pregnant women whose family incomes were up to 185 percent of the poverty level must also cover *all* women, regardless of the household makeup or employment status.[171] Unfortunately, by June of 1988, only six states had raised eligibility for pregnant women to 185 percent of poverty level.[172]

B. Waiving the Application Waiting Period for Pregnant Women.

In 1986, Congress gave the states the option of implementing "presumptive eligibility." That is, a woman could be covered for prenatal care while waiting to establish Medicaid eligibility. This would eliminate waiting for the applications process to conclude as a barrier to prenatal care. Unfortunately by July 1988, only nineteen states had done so.[173]

C. Allowing Additional Medicaid Services Aimed Specifically at Pregnant Women.

The Medicaid-related legislation, enacted in 1986, also made some significant alterations in the method of eligibility determination. For instance, the Consolidated Omnibus Reconciliation Act of 1986 gave states the option to provide pregnant women with additional services that they do not have to provide to other Medicaid recipients. This has led to enhanced maternity benefits in more than twelve states.[174] Also, OBRA of 1986 severed the link between AFDC eligibility requirements and Medicaid eligibility requirements for pregnant women. This removed a major barrier to funding prenatal care in many states. Now a state can provide coverage above the AFDC requirement levels for pregnant women only. This is important because "[it] affords states the opportunity to increase Medicaid eligibility for particular subgroups, and to receive federal matching funds without increasing AFDC program costs."[175]

While Congress's support for expanding Medicaid eligibility for pregnant women has been encouraging, and has certainly increased access to care, there is still much to be done in terms of ensuring access to care for all women. As a society, there are several short-term and long-term goals which we must accomplish before all infants will be guaranteed they are given adequate care and an equal chance before they are born.

D. Increases in MCH Block Grant Funding.

In 1986, Congress substantially increased funding for MCH Block Grants. Previously funded at $478 million a year, MCH funding was raised to $533 million for fiscal year 1987, $557 million for 1988, and to $561 million for subsequent years.[176]

VII. Recommendations for Making Prenatal Care Accessible to All Women

"If the child is safe everyone is safe."[177]

There are several approaches to achieving appropriate levels of prenatal care. First, immediate reforms aimed at the primary barriers to care must be implemented. Ideally, programs aimed at the problems of a particular state or area will be instituted, but in such a way that women in *every* state or area will have access to care. Second, long-term, comprehensive structural reforms which solve the most basic causes of the problems of access to care (*e.g.*, the unavailability of health insurance) must be put into effect.

A. The Short-Term Solutions

For the short term, the overriding concern is overcoming financial barriers to access. There is an overwhelming consensus that this is the primary barrier to care. There is also general agreement in terms of what to do about it.

1. Raise Medicaid Eligibility.

First, the option that states gained under OBRA 1986, to grant Medicaid eligibility to all women up to 185 percent of the poverty level, must be made mandatory.[178] The fact that relatively few states have implemented this option underscores the variations in coverage from state to state. As the OTA states, "there is no reason to think that the variation will be reduced under a program in which participation is voluntary."[179] Making this mandatory should be followed by the expansion of eligibility beyond 185 percent for uninsured or underinsured women.[180] This would help eliminate uninsuredness as a financial barrier to care. It will also eliminate the great disparities in coverage by the individual states. And, as opposed to funding through a block grant program, it will ensure that every woman has at least equal financial access to care, because eligibility will not depend on the amount of money earmarked for prenatal care in a particular year or in a particular state.

2. *Enforce Existing Legislation*

Laws against patient-dumping should be strictly enforced, with serious financial penalties for failure to comply. It appears that only if private hospitals have to face greater financial burdens for patient-dumping will they cease this practice.

3. *Eliminate Bureaucratic Obstacles to Medicaid Eligibility.*

Congress should eliminate any bureaucratic obstacles that the present methods for establishing Medicaid eligibility include. For example, all states should be required to adopt the "presumptive eligibility" that was made available to them as a Medicaid coverage option in OBRA 1986. This would entitle women to free prenatal care during the period that their Medicaid eligibility was being established.[181] It would eliminate any delays in receiving care which are caused by the lengthy eligibility evaluation period under which the states operate. In addition, all state Medicaid programs should be required to make a reasonable effort to inform Medicaid recipients of the range of services that are available to them. The GAO study found that in several instances, the fact that Medicaid will pay for transportation to receive care was not well publicized.[182]

4. *Allocate More Money to MCH Block Grants.*

In addition to taking away the obstacles that Medicaid can create, more money should be allotted to MCH block grants, and of the money allocated, more should be earmarked specifically for maternal care services. Although Congress has recently increased funding for MCH Block Grants, MCH funds are still modest in relation to the demand for financial help in obtaining prenatal care. All nineteen states which are a part of the Southern Regional Task Force on Infant Mortality have reported that present MCH funds are not sufficient to meet their needs.[183] If the 1986 OBRA provision granting eligibility for prenatal care for women up to 185 percent of the poverty level was made mandatory for all states, then some of the cost for services provided by MCH grants would be absorbed by Medicaid funds, leaving more MCH funds available for other maternity-related services. It should be clear, however, that funneling money through the MCH block grant system should be viewed as a supplement to, rather than a substitute for, raising Medicaid eligibility to 185 percent of the poverty level for pregnant women. Raising Medicaid eligibility guarantees coverage, whereas MCH grants are not necessarily predictable sources for funding prenatal care.

5. *Improve Funding to WIC.*

Another program which is of great importance in improving and sustaining maternal health is the WIC (Special Supplemental Food Program for Women, Infants and Children). WIC provides nutrition to low-income pregnant women, infants, and children. This program has recently shown to be effective in preventing premature births, fetal deaths, and other pregnancy-related problems. Despite this, WIC is provided to fewer than half of the people eligible for its assistance.[184] Increasing funding to WIC is a practical way to improve the health of our infants.

6. *Improve Availability of Knowledge About Medicaid And Other Programs.*

While the above suggestions would alleviate many of the financial problems associated with access to prenatal care, expanding the Medicaid budget to allow for education and case-finding could eliminate most of the remaining barriers. As the GAO and the Institute of Medicine[185] report, level of education, minority status, age, marital status, and geographic location are all barriers to care. Better education about available prenatal care services and case-finding would alleviate much of the impact of these barriers.

B. States Which Have Already Implemented Successful Prenatal Care Programs On Their Own.

Several states have created prenatal care access programs which have had notable success in reducing infant mortality rates and increasing rates of adequate prenatal care. These programs could serve as models for a federal program, or at least as guidelines as to which aspects of the federal health care assistance programs need the most immediate restructuring.

1. Massachusetts' Healthy Start Program

The Massachusetts program, Healthy Start, is basically a supplement to existing programs which ensures that even those women who do not have insurance or other financial resources for health care, have access to prenatal medical care. Massachusetts had already opted to expand its Medicaid coverage of pregnant women up to 185 percent of the poverty level. It further expanded its coverage by providing prenatal care for uninsured women up to 200 percent of the poverty level. It includes expanded access to WIC, an accelerated application procedure (eliminating long waits for the processing of Medicaid applications), intensive case management, and nutrition counseling. Any uninsured woman who has a family income of up to 200 percent of the poverty level may enroll; a woman who may also be eligible for Medicaid is required to apply for it, but in the meantime, she is covered by the Healthy Start Program.[186]

The results of the Massachusetts program are impressive. Since 1985, over 16,000 women have participated in Healthy Start. The infant mortality rate dropped 14 percent in one year, going from 8.4 in 1986 to 7.2 in 1987.[187] The drop in the black infant mortality rate was even more dramatic, going from 19.7 to 15.5,[188] a decrease of 21 percent. The Institute of Medicine reported that "[t]he program is noteworthy for emphasizing expansion of the range of sites, including private providers, where low income women can receive services."[189]

The Massachusetts program is also noteworthy because it is one of the few state initiatives which attacked the problem of restricted access to care by reducing financial barriers. Many states, concerned with tight budgets, have attempted to approach the problem in ways which are initially less costly. Massachusetts, however, has had substantial success with the program, and the Institute of Medicine has commented that "initial evaluation suggests that this is a promising approach to reaching high-risk women."[190]

2. California's Obstetrical Access Program

California also designed a program to provide enhanced prenatal care and to improve access to prenatal care in underserved areas.[191] In the late 1970s, California discovered that, although much of the disadvantaged population was already covered by Medi-Cal (California's Medicaid program), prevailing rates of low reimbursement for maternal health services precluded physicians from providing prenatal care. As a result, an increasing number of Medi-Cal and other low-income women were unable to obtain care because they couldn't find a physician who would treat them.[192] Consequently, the main thrust of the California Obstetrical Access program was to eliminate inadequate Medicaid reimbursements as an obstacle to finding a prenatal care provider.

The California program was a pilot program.[193] It expanded the pool of available prenatal care providers by reimbursing health departments and other qualified health care providers for maternity-related services on a capitation basis.[194] It was clearly meant as a supplement to the existing system; the services were provided to women who already qualified for Medi-Cal or other low-income assistance.[195]

The results were encouraging. Mothers who participated in the Ob/Access program had a low birthweight rate that was 33 percent less than for a Medi-Cal matched group of mothers.[196] The program also resulted in higher numbers of women receiving adequate prenatal care.[197] Although the cost of providing enhanced medical care to pregnant women was 5.0 percent higher than the average cost of care provided under the current Medi-Cal program, the cost-benefit ratio was between 1.7 and 2.61 for the short run.[198] Long-term benefits could be even greater.[199]

These are just two of the state programs which have successfully reduced infant mortality and low birthweight through expanded access to prenatal care.[200] Their success at reducing some of the primary barriers to care--financial difficulties and inadequate system capacity--while maintaining a cost-effective program should be a cue to the makers of national health care policy that reforms in the system are both required and possible.

State programs which have been successful have generally targeted both financial and noneconomic barriers to care. The Institute of Medicine comments that because there are multiple and diverse obstacles to prenatal care (*i.e.*, financial problems, social isolation, problems with transportation, negative institutional practices, particular social and/or cultural attitudes toward health and prenatal care, etc.),

> "it is unlikely that any single corrective step, such as removing financial barriers to care, would solve all the access problems for [women who receive insufficient care]. The data suggest that a variety of interventions are needed, aimed as much at basic social functioning as at economic status."[201]

Such observations underscore the need for federal attention to the initiatives of individual states and other areas to increase access to prenatal care. While eliminating most financial barriers to care by raising Medicaid is a primary goal in order to insure universal access to prenatal care, it is not the sole solution to this complex problem.

Location-specific initiatives such as the Massachusetts and California programs need to be created and guaranteed continuous federal support in other states. While programs which are marked for reducing the noneconomic barriers often need to be specific to a particular state or area, the availability of such programs needs to be nationwide. The federal government must take advantage of opportunities to fund, subsidize, create models for and otherwise encourage programs in every state to address the problems of nonfinancial barriers to care. The state-by-state disparities in degree of access to care must be eliminated.

One problem with many state programs is that public support and funds for them are not long-lived or constant enough to improve access to prenatal care permanently.[202] Also, from a civil rights perspective, programs which are successful in reducing the disparity in utilization of care between black and white women should be examined for implementation of similar programs on a federal level. Every woman in every state needs such comprehensive programs, not just the women who are lucky enough to live in particular states, have a particular skin color, or a particular income level.

B. The Long-Term Solutions

The Institute of Medicine's Committee to Study Outreach for Prenatal Care[203] has done an exhaustive study on the subject of improving access to prenatal care for women. As summarized below, they have suggested several long-term solutions which would permanently expand access to adequate prenatal care to all women.

First, the nation must commit itself to providing *all* women with comprehensive prenatal care. Access to adequate care should not be considered a convenience or privilege for the affluent. Leaders of our country from all sectors, public and private, must strive to make this a clear priority for the nation.

In order to accomplish this, we must implement a health care program for pregnant women which closes the gaps in our current system. Such a program must include fundamental reforms and improvements, not incremental changes, in the nature of the present system.

Such a program would have to incorporate several different improvements in order to be effective. The pool of available providers of maternity care must be expanded. The program and the types of benefits it provides must be well-publicized in all geographic areas. Also, the system should have an effective and efficient maintenance and evaluation mechanism. Constant monitoring of program performance and possible unmet maternity needs is critical in order to ensure complete access to prenatal care for all women.

Finally, it is crucial for the nation to reform the present systems of health insurance, medical malpractice insurance, and medical costs in general. The fact that the cost of medicine is spiraling upward in this country is responsible for many of the factors which create obstacles to obtaining prenatal care for women. The above recommendations provide a comprehensive blueprint for the direction we must take in formulating national health care policy in the future in order to insure adequate care for all women, regardless of income level or skin color.

This nation cannot continue to compete and prosper in the global arena when more than one-fifth of our children live in poverty and grow up in ignorance. And if the nation cannot compete, it cannot lead

VIII. Conclusions

The lack of accessibility to prenatal care for many women in our society is a problem of vital importance to the future of our nation. The inability of poor and minority women in our society to obtain care has serious, long-term ramifications for the physical and spiritual health of our nation. In the past eight years, the Reagan administration's relentless crusade to cut the budget for domestic social policies without regard to the financial consequences has produced a situation in which America will spend more money than was "saved" by slashing federal health funding, at least in terms of prenatal care. Additionally, despite the fact the president's policies have adversely affected blacks and other minorities in disproportionate numbers, no federal effort has been put into alleviating this additional burden that minorities must bear. This sad fact becomes tragic when one considers that more money could be saved by correcting the causes for these burdens than by ignoring or aggravating them.

Even if the Reagan administration actually had no responsibility for the sudden deterioration in maternal and infant health in the early 1980s, there still remains the fact that the United States has relatively poor rates of prenatal care use, low birthweight, and infant mortality. This deterioration in maternal and infant health, so crucial to our nation's future, has been ignored for the past eight years. Now, it weighs heavily upon the nation and each individual to effect some sort of change in these policies of apathy and neglect.

It is crucial to recognize that our actions now will have long-term effects. The present state of the health of America's children is deteriorating, and that is cause for much alarm. Recently, the Committee for Economic Development released a report in which 225 corporate executives and university presidents expressed our national self-interest in investing in children:

> This nation cannot continue to compete and prosper in the global arena when more than one-fifth of our children live in poverty and grow up in ignorance. And if the nation cannot compete, it cannot lead. If we continue to squander the talents of millions of our children America will become a nation of limited human potential. . . . America must become a land of opportunity--for every child.[204]

Providing prenatal care to all women will not solve all the problems of poverty and ignorance in this country. Nor will it erase or eliminate the considerable racial inequalities which exist in our society. Yet it would substantially increase the chances of each child to participate in this "land of opportunity." Fortunately, because providing prenatal care to all women is a cost-effective proposition, no one loses if care is available to all. Moreover, everyone benefits.

The underlying problem is that the health care system for pregnant women is not comprehensive. It provides coverage to only certain women, and even then, the result is a patchwork of benefits. It has been shown that poor and minority women are usually at the highest risk for problem pregnancies. Yet these women are the least likely to receive adequate care. They, obviously, have fallen through a hole in our country's social "safety net." In its study of the problems with access to prenatal care, the Institute of Medicine summed up the fundamental problem with our prenatal care system as follows:

> The data and program experience reviewed by the Committee reveals a maternity system that is fundamentally flawed, fragmented, and overly complex. Unlike many European nations, the United States has no direct, straightforward system for making maternity services easily accessible. Although well-insured, affluent women can be reasonably certain of receiving appropriate health care during pregnancy and childbirth, many other women cannot share this expectation. Low-income women, women who are uninsured or underinsured, teenagers, inner-city and rural residents, certain minority group members, and other high-risk populations . . . are likely to experience significant problems in obtaining necessary maternity services.[205]

In other words, there are large gaps in the health care system as regards the care provided to pregnant women.

There is growing sentiment among members of health care and insurance officials that the problems confronting these industries and our nation require a federal solution. Certainly, passing the responsibility for health care costs onto the states has only served to further fragment Medicaid's "safety net." Making outright cuts in the federal health budget, as opposed to addressing the actual causes for medical cost inflation, has hurt more than it has helped.

Unfortunately, immediate reductions in federal spending are often more politically popular than developing comprehensive solutions to the problems with rising medical costs. As concerns our nation, the need for basic reform in the system comes at a time when pressures to reduce the deficit, combined with promises not to raise taxes, increase political pressure to reduce spending. Those in control of our national health policy need to forgo immediate political gratification in order to insure a healthy future for our nation. The results would be saved lives, saved money, and a mitigation of racial inequality.

Percentage of Babies Born to Women Receiving First Trimester Care, by Race, U.S., 1969-1985

Year	All Races	White	Black
1969	68.0	72.4	42.7
1970	67.9	72.4	44.3
1971	68.6	73.0	46.6
1972	69.4	73.6	49.0
1973	70.8	74.9	51.4
1974	72.1	75.9	53.9
1975	72.3	75.9	55.8
1976	73.5	76.8	57.7
1977	74.1	77.3	59.0
1978	74.9	78.2	60.2
1979	75.9	79.1	61.6
1980	76.3	79.3	62.7
1981	76.3	79.4	62.4
1982	76.1	79.3	61.5
1983	76.2	79.4	61.5
1984	76.5	79.6	62.2
1985	76.2	79.4	61.8

Source: National Center for Health Statistics.
As cited in Children's Defense Fund, A Children's Defense Budget FY 1989 257 (1988).

Percentage of Babies Born to Women Receiving Late or No Prenatal Care, by Race, U.S., 1969-1985

Year	All Races	White	Black
1969	8.1	6.3	18.2
1970	7.9	6.2	16.6
1971	7.2	5.8	14.6
1972	7.0	5.5	13.2
1973	6.7	5.4	12.4
1974	6.2	5.0	11.4
1975	6.0	5.0	10.5
1976	5.7	4.8	9.9
1977	5.6	4.7	9.6
1978	5.4	4.5	9.3
1979	5.1	4.3	8.9
1980	5.1	4.3	8.8
1981	5.2	4.3	9.1
1982	5.5	4.5	9.6
1983	5.6	4.6	9.7
1984	5.6	4.7	9.6
1985	5.7	4.7	10.0

Late care is defined as starting in the third trimester.
Source: National Center for Health Statistics. As cited in Children's Defense Fund, A Children's Defense Budget FY 1989 257 (1988).

Percent of Births by Adequacy of Mother's Prenatal Care, White, 1985

Adequate Care

Rank	State	Percent
1	Connecticut	83.1
2	Massachusetts	81.4
3	New Hampshire	81.1
4	Mississippi	80.9
5.	Iowa	80.4
6.	Wisconsin	80.3
7	Maryland	80.0
8	Rhode Island	79.7
9	North Carolina	79.7
10	Michigan	79.1
11	Ohio	78.2
12	Virginia	78.1
13	Kansas	78.0
14	Louisiana	77.2
15	Missouri	76.9
16	Maine	76.6
17	New Jersey	76.5
18	Alabama	76.1
19	Georgia	75.4
20	Pennsylvania	74.2
21	Nebraska	74.0
22	Washington	73.5
23	Illinois	73.4
24	Montana	73.2
25	Indiana	73.0
26	Delaware	72.8
27	Tennessee	72.6
28	Minnesota	72.3
29	Utah	71.6
30	Colorado	71.4
31	District of Columbia	71.3
32	Wyoming	70.9
33	Kentucky	70.5
34	Oregon	70.2
35	Hawaii	69.9
36	Nevada	69.5
37	Idaho	69.3
38	South Carolina	68.9
39	Alaska	68.8
40	South Dakota	67.8
41	Arkansas	67.5
42	North Dakota	67.5
43	New York	66.9

Percent of Births by Adequacy of Mother's Prenatal Care, Black, 1985

Adequate Care

Rank	State	Percent
1	New Hampshire	78.9
2	North Dakota	74.1
3	Maine	70.4
4	Hawaii	65.8
5	Michigan	65.7
6	Iowa	65.4
7	Montana	65.3
8	Idaho	64.0
9	Massachusetts	63.6
10	Rhode Island	63.2
11	Kansas	62.9
12	Wyoming	60.6
13	South Dakota	60.2
14	Colorado	59.7
15	Ohio	59.2
16	Virginia	58.7
17	Maryland	58.0
18	Alaska	57.3
19	Washington	57.1
20	North Carolina	56.8
21	Arizona	56.6
22	Missouri	55.2
23	Connecticut	54.1
24	Georgia	53.8
25	Mississippi	53.5
26	New Jersey	53.5
27	Oregon	53.3
28	Kentucky	52.9
29	Tennessee	52.6
30	Minnesota	52.4
31	Nebraska	52.4
32	Utah	50.9
33	Wisconsin	49.8
34	Delaware	49.8
35	Illinois	48.7
36	Nevada	47.1
37	Louisiana	47.1
38	District of Columbia	46.9
39	Indiana	46.7
40	Texas	46.6
41	Alabama	46.3
42	Pennsylvania	46.3
43	Oklahoma	46.1

44	Florida	66.5
45	Oklahoma	65.7
46	Arizona	65.6
47	Vermont	63.6
48	West Virginia	62.1
49	Texas	59.3
50	New Mexico	52.3
	United States	72.3

44	West Virginia	44.1
45	South Carolina	44.0
46	New Mexico	43.7
47	Florida	42.2
48	Arkansas	41.4
49	New York	37.1
	United States	50.1

Source: National Center for Health Statistics.
Calculations by Children's Defense Fund.

Characteristics of State Medicaid Programs for Children and Pregnant Women, 1987*

State	Maximum AFDC payment, family of 3: percentage of federal poverty
Alabama	15.4
Alaska	77.4
Arizona	37.8
Arkansas	24.8
California	79.6
Colorado	44.6 (54.3)
Connecticut	65.2
Delaware	40.0
District of Columbia	47.0
Florida	34.1
Georgia	33.0
Hawaii	52.5
Idaho	39.2
Illinois	44.1
Indiana	33.0
Iowa	49.2
Kansas	46.7
Kentucky	25.4
Louisiana	24.5
Maine	52.3 (72.0)
Maryland	44.5
Massachusetts	63.4
Michigan	80.4 (69.6)
Minnesota	68.6
Mississippi	15.5 (47.4)
Missouri	36.0
Montana	45.7
Nebraska	45.2
Nevada	36.8
New Hampshire	51.2
New Jersey	52.1
New Mexico	33.3
New York	64.1
North Carolina	33.4
North Dakota	58.6
Ohio	39.0
Oklahoma	40.0
Oregon	51.2
Pennsylvania	47.1
Rhode Island	64.9
South Carolina	25.7 (50.0)
South Dakota	31.7
Tennessee	20.0 (45.5)

Texas	23.7
Utah	48.5 (89.4)
Vermont	70.7
Virginia	37.5
Washington	63.5
West Virginia	32.1
Wisconsin	60.1
Wyoming	46.5

* As cited in Children's Defense Fund, A Children's Defense Budget FY 1989 260 (1988)

Comparison of Infant Mortality Rates in the United States and Other Countries, 1985

Country	Infant mortality rate, 1985
1. Japan	5.5
2. Finland	6.3
3. Sweden	6.7
4. Switzerland	6.9
5. Denmark	7.9
6. Canada	7.9
7. Netherlands	8.0
8. France	8.1
9. Norway	8.3
10. Ireland	8.9
11. United Kingdom	9.4
12. Belgium	9.4
13. West Germany	9.5
14. East Germany	9.9
15. Australia	9.9
16. Spain	10.5*
17. United States	10.6
18. Italy	10.9
19. New Zealand	11.0
20. Austria	11.0
21. Israel	11.9
22. Brunel	12.0
23. Malta	13.6
24. Greece	14.0
25. Czechoslovakia	15.3**
26. Bulgaria	15.8
27. Cuba	16.5
28. Poland	18.5
29. Hungary	20.4
30. Romania	23.4**

SOURCE: A. Von Cube, Population Reference Bureau, Washington, D.C., personal communication, May and September 1987. U.S. Congress, Office of Technology Assessment, Healthy Children: Investing in the Future, OTA-H-345, 32 (1988).

*This was Spain's rate for 1983.
**These rates are for 1984.

Infant Mortality Rates, by Race, U.S., 1940-1983

Year	White	Black	Ratio of Black to White
1940	43.2	72.9	1.69
1941	41.2	74.1	1.80
1942	37.3	64.2	1.72
1943	37.5	61.5	1.64
1944	36.9	59.3	1.61
1945	35.6	56.2	1.58
1946	31.8	48.8	1.53
1947	30.1	47.7	1.58
1948	29.9	45.7	1.53
1949	28.9	46.8	1.62
1950	26.8	43.9	1.64
1951	25.8	44.3	1.72
1952	25.5	46.9	1.84
1953	25.0	44.5	1.78
1954	23.9	42.9	1.79
1955	23.6	43.1	1.83
1956	23.2	42.4	1.83
1957	23.3	44.2	1.90
1958	23.8	46.3	1.95
1959	23.2	44.8	1.93
1960	22.9	44.3	1.93
1961	22.4	41.8	1.87
1962	22.3	42.6	1.91
1963	22.2	42.8	1.93
1964	21.6	42.3	1.96
1965	21.5	41.7	1.94
1966	20.6	40.2	1.95
1967	19.7	37.5	1.90
1968	19.2	36.2	1.89
1969	18.4	34.8	1.89
1970	17.8	32.6	1.83
1971	17.1	30.3	1.77
1972	16.4	29.6	1.80
1973	15.8	28.1	1.78
1974	14.8	26.8	1.81
1975	14.2	26.2	1.85
1976	13.3	25.5	1.92
1977	12.3	23.6	1.92
1978	12.0	23.1	1.93
1979	11.4	21.8	1.91
1980	11.0	21.4	1.95
1981	10.5	20.0	1.90
1982	10.1	19.6	1.94
1983	9.7	19.2	1.98

Source: National Center for Health Statistics.

The history of discrimination in mortgage lending has been well documented, as has the federal government's role in promoting and perpetuating discriminatory mortgage lending practices

CHAPTER XVI

FEDERAL ENFORCEMENT OF THE FAIR LENDING, EQUAL CREDIT OPPORTUNITY, AND COMMUNITY REINVESTMENT LAWS IN THE 1980s

by Stephen M. Dane

I. Introduction

This paper analyzes the federal government's more recent efforts to enforce those laws and regulations that relate to fair lending, equal access to credit, and community reinvestment. It begins with the proposition that discrimination in credit transactions and the unavailability of much needed credit are still significant problems in this country. It next summarizes the development and current status of the law in this area. It documents the federal government's recent efforts to modify and enforce the fair lending, equal credit, and community reinvestment laws, highlighting both its successes and its failures over the past eight years. Finally, the paper suggests improvements to those laws and their enforcement.

II. Discrimination in Access to Credit: A Statement of the Problem

The history of discrimination in mortgage lending has been well documented, as has the federal government's role in promoting and perpetuating discriminatory mortgage lending practices.[1] When Congress in the 1970s turned its attention to equal credit opportunity issues and discrimination in housing and consumer finance, there was much evidence that minorities, minority neighborhoods, women, and the elderly were subject to a dual housing finance market and suffered from a lack of access to conventional home mortgage credit. Studies conducted by the Comptroller of the Currency and the Federal Home Loan Bank Board indicated the "strong probability of race discrimination in mortgage credit."[2] Evidence presented at hearings before the U.S. Senate Committee on Banking, Housing and Urban Affairs in consideration of the Home Mortgage Disclosure Act of 1975 supplied "ample documentation that credit-worthy persons are sometimes denied loans on sound homes solely because of the location of the property."[3] Studies and testimony from more than a dozen cities showed consistent reluctance on the part of most lenders to make loans in older inner-city neighborhoods.[4] Later studies using data from the mid-1970s confirmed that race was a statistically significant factor in the conventional mortgage markets of many urban areas.[5]

Although the race of the applicant or the racial composition of the neighborhood in which the mortgaged property was located were the most studied and publicized credit problems during this period, they were not the only ones. Testimony in the early 1970s before the National Commission on Consumer Finance noted that single women faced a variety of lender prejudices and were therefore unable to obtain mortgages to buy real estate.[6] In congressional hearings presaging the Equal Credit Opportunity Act of 1976, discrimination against the elderly in consumer credit transactions was the most often cited abuse, despite the fact that in the experience of many creditors their older customers were their best customers.[7]

By 1980 there existed at least 250 studies of mortgage lending patterns conducted by academics, government agencies, and community organizations. An examination of the lending patterns documented by those studies showed a general lack of conventional lending in the inner city, particularly in racially changing areas.[8] A 1980 Federal Trade Commission investigation of mortgage lenders and finance companies found that various subtle forms of discrimination, such as discouraging minorities and others from even applying for credit, appeared to be replacing earlier, more blatant discriminatory practices.[9] An analysis of data collected by the Federal Home Loan Bank Board from FSLIC-insured institutions between October 1980 and June 1983 reveals that blacks were filtered out of the home mortgage process at greater rates than nonminorities.[10]

The most recent access-to-credit studies conclude that race still plays the most significant role in determining who gets conventional mortgage financing. A study of 1983-84 mortgage loan data from the Milwaukee metropolitan area showed that race was "an important factor" in determining the distribution of lending within the area, even after other population and neighborhood characteristics were taken into consideration.[11] A 1984 study by the Woodstock Institute of residential lending patterns in Chicago and its suburbs documented, among other findings, "huge inequalities in the distribution of housing credit throughout the Chicago area that cannot be explained solely by market factors or differences in selling prices."[12] Between 1981 and 1984, neighborhood racial composition directly influenced the distribution of all types of residential lending in Baltimore and all single-family mortgages in its suburbs, even after controlling for normal market mechanisms, such as demand for credit and differences in income levels.[13] A study of New York City lending data showed that applicants from moderate-income, white neighborhoods were three times more likely to receive mortgage loans than applicants from moderate-income, minority neighborhoods. After controlling for all possible other explanations, the authors of the study determined that the only significant variable was race.[14]

Examples of poor lending performance by individual lenders, and the lending industry generally, span the country. Studies conducted in Washington, D.C. and Denver resulted in findings that "race was the strongest predictor of any factor . . . looked at in influencing lending."[15] In Toledo, Ohio, one national bank had only 1.8 percent of its total residential mortgage loan portfolio invested in low-income, minority neighborhoods between 1980 and 1984.[16] In Gary, Indiana, a review of one lender's home mortgage data revealed that it made no mortgage loans in the city between 1980 and 1987. In Tucson, Arizona, the total money made available by one bank for home purchase loans was consistently five times greater in the predominantly white areas of the city than for the minority areas.[17]

Two of the most striking studies come from large metropolitan areas with significant minority populations, Detroit and Atlanta. Both studies, commissioned by major metropolitan newspapers, found highly disparate lending patterns among banks and thrift institutions in white and minority neighborhoods. The Detroit Free Press determined that banks and savings institutions made home loans in the city's white, middle-income neighborhoods at three times the rate of similar black neighborhoods.[18] The study reported that the lending gap between white and black neighborhoods, in the predominantly black city, increased every year from 1982 until it reached a 3-to-1 ratio in 1986, the most recent year complete data were available. Michigan's chief banking regulator, Eugene Kuthy, acknowledged that the findings of the Free Press study were "consistent with trends we have observed in our yearly report on mortgage lending in Michigan."[19]

In Atlanta the lending gap was even larger. White neighborhoods received five times as many home loans from Atlanta's banks and savings and loans as black neighborhoods of similar income, a gap that widened in each year of the study.[20] Even controlling for demand, sales activity, and other economic factors, huge disparities remained. An analysis of applications data revealed that black applicants for home purchase loans were rejected four times as often as whites. One federal savings and loan rejected the loan applications of 36 percent of its black applicants, while rejecting only 10 percent of the white applicants. One bank made thirty-eight times as many loans per structure in white neighborhoods than in comparable black neighborhoods. The study carefully controlled for income and growth, and reviewed patterns over several years, during times of very different national economic conditions and mortgage markets. Yet, nothing explained the different lending patterns as well as race.[21]

The federal government has also noted continuing equal credit problems. The Department of Justice has observed that American Indians who reside on reservations continue to experience problems in obtaining credit on a nondiscriminatory basis, and that many developers and financiers in the resort property industry continue to violate the Equal Credit Opportunity Act (ECOA).[22] For the past two years the Department has noted that evidence of age discrimination in consumer transactions continues to surface.[23] The five financial regulatory agencies have reported declines since 1986 in lender compliance with the technical requirements of Regulation B, the federal government's principal regulation implementing ECOA.[24] As late as 1987, over one-fourth of the regulated institutions studied were in technical violation of the Act or Regulation B, a slightly higher level of noncompliance than reported in 1983 and 1984.[25] In the first quarter of 1988, 130 (37 percent) of the 348 national banks examined by the Comptroller of the Currency for compliance with ECOA were in violation of the Act.[26] The Federal Home Loan Bank Board has seen a steady increase in discrimination complaints since 1982.[27]

There is also growing concern among fair lending advocates that private mortgage insurance companies,[28] and the secondary mortgage market,[29] have adopted policies and underwriting criteria that have a disparate impact on inner-city, minority neighborhoods and discriminate against low-income borrowers.[30] These practices include establishing minimum loan amounts, requiring high minimum downpayments, imposing unduly restrictive credit rating requirements, adopting unnecessary restrictions on the consideration of certain sources of income, arbitrarily considering abandonment ratios in the relevant neighborhood, and other practices.[31] Evidence exists to show that homeowners insurers engage in neighborhood discrimination.[32]

The result of all of this is a clear consensus among fair housing advocates and researchers that "redlining is alive." This belief was consistently expressed at hearings in March, 1988 before the Senate Committee on Banking, Housing and Urban Affairs.[33] The fact that discrimination in housing and consumer finance still exists in the late 1980s suggests an ineffective response by the federal government to remedy what was identified as a problem over a decade ago. This federal failure is due, in part, to a weak and disjointed statutory scheme and, in part, to a lack of commitment by the federal agencies charged with enforcing that scheme, as the discussion that follows demonstrates.

III. Laws and Regulations Prohibiting Discriminatory Lending Practices.

In the late 1960s and 1970s, the federal government created a patchwork quilt of equal credit opportunity and fair lending statutes and regulations. Any particular lender suspected of discriminatory lending activity may be subject to some statutes and regulations, but not others. Enforcement mechanisms vary widely. For some statutes, only administrative regulation and enforcement are available, and even then such authority is dispersed among many different federal agencies. The Attorney General has authority to pursue litigation to enforce some laws, but not others. Some federal statutes expressly grant a right to sue to the applicant, or other person aggrieved, by a discriminatory lending decision. Other laws prohibit one or more types of discrimination but do not provide for an express cause of action to the person aggrieved. Still others are merely recordkeeping or policy statutes designed to inhibit discriminatory lending practices, or promote investment in traditionally redlined neighborhoods, without providing for any meaningful penalties for those lenders who fail to comply. This section will identify those federal statutes, regulations, and executive orders that relate to equal access to credit.

A. Executive Orders 11063 and 12259.

Issued by President Kennedy in 1962, Executive Order 11063 directs federal agencies to ensure that no racial discrimination occurs in financial transactions relating to loans insured or guaranteed by the federal government, that is, FHA and VA loans. Executive Order No. 12259, issued by President Carter in 1980, expanded the coverage of Executive Order 11063 to prohibit discrimination in such transactions based on religion, sex, and national origin, and charged HUD with primary responsibility for coordinating agency implementation of both orders.

Although these executive orders impose nondiscrimination requirements on persons with whom the federal government does business, there exists no private mechanism to enforce them. HUD, and other executive branch agencies, can enforce the orders through informal methods of conference, conciliation, and persuasion, or by canceling agreements, refusing further aid, or otherwise taking appropriate regulatory action against any lender in violation of the orders. Agencies can refer violations of the Orders to the attorney general, who has exclusive authority to initiate civil or criminal actions.

B. Prohibitive Statutes.

1. *The Fair Housing Act.*

Section 805 of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, prohibits discrimination in the financing of housing.[34] As is true for the Act generally, any person "aggrieved" by a discriminatory lending practice may assert a cause of action under Sec. 805, regardless of the person's race and regardless of whether the person was the actual applicant for the financing. Thus, in many of the early reported cases the plaintiffs were white applicants seeking loans in minority or integrated neighborhoods.[35]

The new Fair Housing Amendments Act of 1988[36] completely changes the enforcement scheme under Title VIII. Previously an aggrieved individual could either initiate a legal proceeding in any federal or state court of competent jurisdiction or file an administrative charge with the Secretary of the Department of Housing and Urban Development. The Secretary's only statutory responsibility, however, was to investigate the charge of discrimination and "try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion."[37] The recent amendments provide for administrative adjudication as an alternative to judicial action, grant the Secretary of HUD specific enforcement authority, and expand the role of the attorney general in all Title VIII litigation.

Despite the fact that the Fair Housing Act is now twenty years old, there are few reported cases construing the specific section prohibiting discrimination in financing. Some of these cases, however, are significant. Most significant are recent cases defining a prima facie case of discrimination under the Act.[38] Although not absolutely clear from a reading of the statute itself, Sec. 805 has been construed to prohibit discrimination based upon the location of the property, that is, redlining.[39] This conclusion is buttressed by federal regulations promulgated under authority of the Act.[40] Federal courts have held that a lender's inconsistent application of its foreclosure policies or procedures is prohibited by the Act.[41] Sec. 805 has been applied to developers and persons or entities other than banks and financial institutions who offer financing for the purchase, construction, or improvement of homes.[42] A companion provision, Sec. 804, has been held to encompass discriminatory appraisal practices[43] and insurance redlining.[44]

One court has narrowly construed Sec. 805, however, not to apply to home equity loans, at least where the purpose of securing the equity loan is unrelated to the improvement, repair, or maintenance of the dwelling.[45] This conclusion is now suspect in light of the recent changes to be made by the Fair Housing Amendments Act of 1988, which includes home equity loans within the coverage of Sec. 805. The Fair Housing Amendments Act also expands the financing discrimination section by expressly prohibiting discriminatory activities of appraisers and secondary mortgage market purchasers.

2. *Equal Credit Opportunity Act.*

Enacted in 1974 and amended in 1976, the Equal Credit Opportunity Act (ECOA)[46] is both broader and narrower in scope than the Fair Housing Act. It is broader in two significant respects. First, it prohibits discrimination in all credit transactions, not just housing finance transactions. Second, it prohibits discrimination not only on the basis of race, color, religion, national origin, or sex, which are identified in Title VIII, but also discrimination based upon marital status, age, the receipt of income from public assistance programs, or the good faith exercise of rights under the Consumer Credit Protection Act.

ECOA is narrower in scope because it protects only applicants for credit, as distinguished from Title VIII's broad applicability to "any person aggrieved" by a discriminatory lending practice.[47] At least two courts have held in the residential mortgage context that persons or organizations other than the loan applicant do not have standing to assert a claim under ECOA.[48]

Despite its comparatively strong enforcement provisions, ECOA has not been the subject of voluminous public or private litigation.[49] With the exception noted above, however, the Fair Housing Act and ECOA are equivalent enough that such cases construing the Fair Housing Act should be applicable to claims asserted under ECOA. Thus, the requirements of a prima facie case of discrimination are the same under both laws, and any underwriting, appraisal, or financing policy or practice that has an adverse impact on one or more of the statutorily protected groups is a violation of ECOA.[50]

Many federal regulatory agencies are responsible for enforcement of ECOA, and each is authorized to issue regulations relating to such enforcement.[51] The attorney general is authorized to prosecute any matter referred to him by those agencies, or he can bring an action independently of any such referral.[52]

3. *The Civil Rights Acts of 1866 and 1870.*

The Civil Rights Acts of 1866 and 1870[53] state a right to equal treatment in the acquisition of property and the making of contracts. Although enacted in an era largely pre-dating the development and growth of the lending and mortgage industries, the courts have had little difficulty in concluding that these statutes prohibit discrimination in lending practices.[54]

In contrast to the Fair Housing Act and ECOA, however, they prohibit discrimination only on the basis of race; they do not prohibit discrimination based on religion, sex, national origin, marital status, age, or the receipt of public assistance.[55]

They also differ in that a plaintiff must prove discriminatory intent in order to prevail. Moreover, neither the attorney general nor any other federal agency is expressly authorized to initiate any action or otherwise enforce them. Enforcement efforts, therefore, rest solely on private lawsuits brought by victims of discrimination.

4. *Title VI of the Civil Rights Act of 1964.*

Title VI of the Civil Rights Act of 1964[56] prohibits discrimination under any program receiving federal financial assistance. Primary responsibility for enforcement of Title VI rests with each federal agency providing the federal assistance covered by the Act.[57] Although the attorney general is given no independent authority to enforce Title VI, the Department of Justice has interpreted the Act implicitly to authorize the attorney general to commence a civil action upon referral from an enforcing agency.[58]

5. *Title I of the Housing and Community Development Act of 1974.*

Title I of the Housing and Community Development Act of 1974[59] prohibits discrimination based on race, color, national origin, or sex, in the implementation or benefits of any program or activity funded in whole or in part under the Act. HUD and the attorney general have express authority to enforce the Act.[60] It has been held that an unsuccessful applicant for a loan administered under a community development block grant cannot maintain a private cause of action under this statute.[61]

6. *Title V of the National Housing Act.*

Section 527 of the National Housing Act[62] prohibits discrimination on the basis of sex in extending mortgage credit on "federally related" mortgage loans, which by statutory definition makes the Act applicable to virtually all conventional, FHA, and VA loans.[63] Lenders are prohibited by this statute from refusing to consider the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member thereof.

C. Regulatory Statutes.

1. *Home Mortgage Disclosure Act.*

The Home Mortgage Disclosure Act (HMDA)[64] requires depository institutions to compile and make available, for public inspection and copying, the number and total dollar amount of mortgage loans originated or purchased by that institution during each fiscal year.[65] The Act is solely a recordkeeping and disclosure statute; it does not prohibit redlining or discriminatory lending practices, and therefore does not provide any private cause of action to persons aggrieved by a lender's discriminatory practices. Enacted in 1975, the theory behind the Act was that the public disclosure of geographical lending patterns by depository institutions would "deter" them from practicing redlining.[66] The requirements of the Act are enforced by the federal financial regulatory agencies.

2. *Community Reinvestment Act.*

The Community Reinvestment Act (CRA)[67] requires federal financial supervisory agencies to assess a regulated institution's record of meeting the credit needs of its community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institutions. Like the Home Mortgage Disclosure Act, the CRA was designed to improve the performance of regulated financial institutions in urban neighborhoods.[68] Also like HMDA, the CRA does not provide any express cause of action to those wishing to challenge a regulated institution's compliance with the Act. Some federal agencies, however, have promulgated regulations which permit individuals or community interest groups to challenge, on CRA grounds, a lender's application for approval to expand its service area.[69] This "CRA protest" procedure provides an extremely powerful tool to fair lending advocates wishing to challenge an institution's lending policies and practices.

D. Regulations.

Many regulations relating to the fair lending, equal credit,and community reinvestment laws have been promulgated by the federal financial supervisory agencies.[70] As with the statutory framework on which they are based, these regulations are scattered, overlap each other in some respects, are completely silent in other respects, apply only to certain financial institutions, are enforced by different federal agencies, and, in general, are as confusing to keep straight as are the statutes they enforce.[71] The most noteworthy regulations are those issued by the Federal Reserve Board (Regulation B, the principal regulation implementing ECOA),[72] and the Federal Home Loan Bank Board[73] that proscribe a wide variety of lending practices that do or could discriminate against minorities, minority neighborhoods, women, and other protected groups.[74]

IV. Efforts to Change Legal Standards Since 1980.

The patchwork quilt of federal statutes and regulations relating to equal credit and community reinvestment was created largely between 1968, when the Fair Housing Act was passed, and 1977, when the Community Reinvestment Act was enacted. In the past decade, there have been few legislative, regulatory, or judicial efforts to change the legal standards adopted by the scheme, despite many recommendations for improvement.[75] What few attempts have been made are summarized below.[76]

A. Legislation.

Many attempts were made over the past decade to amend the Fair Housing Act, but none were successful until 1988. Late in that year, Congress passed the Fair Housing Amendments Act[77] which substantially modified and strengthened the enforcement of Title VIII. As mentioned previously, significant substantive changes were made to the financing discrimination provision.

Section 419 of the Housing and Community Development Act of 1987[78] prohibits lenders from establishing minimum mortgage amounts for FHA loans. Fair lending advocates have increasingly voiced concern over the disproportionate impact of such policies on minorities and minority neighborhoods.[79] Unfortunately, the legislation does not address minimum mortgage amounts for conventional loans.

Section 565 of the same Act makes mortgage companies owned by regulated banks and thrifts subject to the disclosure requirements of the Home Mortgage Disclosure Act. Because mortgage companies are not covered by HMDA, they are not required to report the location, amount, and number of mortgage loans they make in metropolitan areas. Sec. 565 ensures that regulated banks and thrifts do not avoid the requirements of HMDA by using separately incorporated mortgage companies to accept mortgage applications. Section 565 also makes the Home Mortgage Disclosure Act permanent.

B. Regulations.

The Department of Housing and Urban Development in the last days of the Carter administration submitted to Congress comprehensive Title VIII regulations that would have assisted in the interpretation of the financing discrimination provisions of Title VIII. As the Citizens' Commission on Civil Rights has already observed, the first action the Reagan administration took with respect to fair housing generally was to recall these proposed regulations.[80]

In the early 1980s the Federal Home Loan Bank Board and the FDIC proposed to eliminate the collection of certain data relevant to the enforcement of Title VIII and the Community Reinvestment Act.[81] The proposals were not adopted after the substantial negative reaction they received.[82]

In 1983 HUD, without explanation, discontinued collecting and reporting data on the location of FHA loans originated by mortgage companies. The elimination of this data from the public domain may be hampering the efforts of serious researchers attempting to document equal credit access problems.[83]

In 1985 the Federal Reserve Board issued revisions to Regulation B and published an official staff commentary to assist creditors in complying with the regulation.[84] Among the notable improvements were an expanded definition of the term "applicant" that grants legal standing to guarantors of loans when a creditor has improperly required their signatures. The revisions also imposed additional data collection requirements.[85] The Board failed to adopt proposed changes that would have extended the technical requirements of Regulation B to business credit transactions and to lease transactions.[86]

In 1987, the Federal Reserve Board amended its Official Staff Commentary to make clear that lenders are not required by Regulation B to collect data regarding home equity or home improvement loans.[87] In August, 1988 the FDIC followed the Fed's lead by narrowing its regulatory definition of "home loan" for data collection purposes so that the lenders it regulates no longer need to collect data regarding home equity and home improvement loans.[88] The banking community generally favored the FDIC's move, while community advocacy groups and another agency of the federal government opposed it.

The omission of home improvement and home equity loans from the data collection regulations, after ten years of obtaining such data by some agencies, is extremely unfortunate. The U.S. Commission on Civil Rights in 1979 praised the FDIC for its comprehensive data collection regulations and contrasted its collection of home improvement loan data with the Federal Reserve Board's failure to do so.[89] Home equity loans now rate as the fastest growing consumer loan product in the country. Congress has declared that discrimination in the processing of such loans is prohibited by the Fair Housing Act, and data regarding lender distribution and treatment of such loans by racial, neighborhood, and gender categories would be very helpful to the regulators and others who monitor lender behavior. Moreover, there is some evidence that race plays a factor in home improvement lending.[90]

C. Case Law.

As noted earlier the case law interpreting Title VIII, ECOA, and other credit discrimination laws is relatively sparse.[91] There have been no reported efforts by the federal government to modify, supplement, or pull back from the case law that currently exists. Indeed, as demonstrated in the next section, the Department of Justice has engaged in little meaningful equal credit litigation at any time.

V. Failures of Enforcement

The patchwork quilt of federal statutes, regulations, and executive orders that are designed to prohibit discriminatory lending practices is enforced by a labyrinthine network of federal agencies. In many areas the enforcement powers of those agencies overlap. In other areas the enforcement scheme is so weak as to allow no enforcement at all. This section will highlight the failures and successes of federal enforcement of these laws over the past eight years.

A. Department of Justice.

Of the statutes identified in Section III above, the Attorney General of the United States is empowered to enforce the Fair Housing Act, the Equal Credit Opportunity Act, Title VI of the Civil Rights Act of 1964, and Executive Order No. 11,063.

The Department's efforts to enforce these equal credit laws have been analyzed in detail before.[92] Prior to 1980 the Department was praised for the impressive quality of its litigation record in cases involving discrimination in apartment rentals and racial steering.[93] Of the more than 300 housing discrimination cases filed by the Department between 1969 and 1978, however, few involved important lending issues such as mortgage and insurance redlining.[94] Prior to 1980 the Department initiated only a handful of mortgage lending discrimination cases, only one of which, the Department's suit against the appraisal industry, resulted in a landmark decision relating to credit issues.[95] The Department did file an amicus brief in a case which established the proposition that racial redlining violates the Fair Housing Act,[96] and an amicus brief in another case which held that a lender violates ECOA by treating unmarried applicants differently than married applicants,[97] but these cases were initiated and ultimately successfully resolved by private plaintiffs. The Department lost repeatedly, trying to persuade the courts that the attorney general has standing under ECOA to recover damages on behalf of victims of discrimination,[98] and lost arguments regarding removal jurisdiction that it made in an October, 1980 amicus brief filed in a private case.[99]

The Department's enforcement efforts in the equal credit area have not improved much in the last eight years. The first equal credit case of the Reagan administration was not filed until October 14, 1982.[100] Between then and November 1, 1987 only a dozen or so additional credit cases have been filed by the Department.[101] It has not filed an amicus brief in a private credit discrimination case since December 4, 1980.[102] Almost all of the cases filed during the Reagan administration have been resolved by consent decree.[103] None of the cases filed since 1981 have resulted in any significant interpretation of the equal credit and fair lending laws. The Department lost on the merits one of its few consumer credit cases that did not result in a consent decree.[104]

The Department can claim some positive achievements since 1980. It prevailed in the one equal credit case that did go to trial. It filed more credit cases (six) in 1986 than in any other single year since the Fair Housing Act and ECOA were passed. It has devoted significant attention to equal credit problems experienced by American Indians.[105] It regained some lost ground on the issue of standing by obtaining a district court decision holding that the Federal Trade Commission, acting through the attorney general, has authority under ECOA to seek civil penalties and consumer remedies.[106]

There are many possible explanations for the Department's generally unimpressive record in prosecuting lending discrimination claims.

First, the Department's lack of subpoena power under Title VIII and ECOA may impede the investigation of lending discrimination claims. The Department itself has recognized that the lack of general subpoena power can be a major problem in racial redlining and other lending discrimination cases.[107] The Department also apparently continues to shun the use of investigative techniques that have become standard in the fair housing field, such as testing and statistical analysis of data, to identify potential finance discrimination cases.[108]

Second, the Department rarely receives referrals from other federal agencies charged with equal credit enforcement authority.[109] In 1980 and 1981 the Department expressed its "concern" with the relatively small number of credit discrimination referrals it was receiving, despite the high incidence of violations noted by other agencies.[110] Between 1978 and 1988, the Department reported only one matter referred to it by another agency (the FTC) under the authority of Sec. 706(g) of ECOA.[111]

Third, the internal organization of the Department does not seem conducive to a vigorous enforcement program in the equal credit area. As of September 20, 1978 the Department had only eight attorneys on its staff responsible for credit cases.[112] In April 1979, the Housing and Credit Section of the Civil Rights Division was merged with the Education Section to form the General Litigation Section.[113] Staffed with forty-three lawyers and thirty-two paralegal and clerical employees, the mission of the section was to attack interrelated problems--such as housing discrimination and school desegregation--on a broad basis rather than piecemeal.[114] There was no specialization; each staff member was expected to have credit responsibilities. In November 1983, credit responsibilities were split off from the General Litigation Section and were given to a newly-formed Housing and Civil Enforcement Section.[115] The change in structure was designed to establish smaller litigation groups that would focus on discrete problems.[116] The seventeen lawyers and thirteen paralegal and clerical employees originally assigned to it were responsible for enforcing not only the fair housing and equal credit laws, however, but also federal statutes prohibiting discrimination in public accommodations and in federally funded municipal services.[117]

Thus, there appears to be no consistent, clearly focused method of dealing with equal credit matters. Individual staff members in the Housing and Civil Enforcement Section work on all statutes for which the Section has responsibility.[118]

There has been no change in the total size of the Section's staff since 1983; it still has an authorized strength of only eighteen attorneys and twelve paralegals and support staff.[119]

Without an increase in staff, or a more focused approach to credit issues, the chances are slim that the Department can significantly increase its enforcement efforts in the field.

Fourth, the Reagan administration has demonstrated less vigor than previous administrations in its enforcement of the nation's civil rights laws.[120] Of particular importance to fair lending litigation is the administration's abandonment of the "effects" test under Title VIII.[121] This test is of critical importance in the mortgage lending field where facially neutral loan underwriting guidelines and pricing policies may have a disparate impact on minorities and minority neighborhoods, even though an intent to discriminate may not be apparent.

Finally, the administration has consistently espoused a hands-off approach to vigorous regulation of the financial industry. This is evidenced by its push for deregulation of the financial industry in the early 1980s and by the failure of the federal supervisory banking agencies to enforce the equal credit and community reinvestment laws subject to their jurisdiction.[122]

It would be hard to fault the Department if indeed there were no indications that lending discrimination still exists. The evidence, however, is to the contrary.[123] Private plaintiffs have identified, and successfully litigated, lending discrimination cases. There is no reason why the Department of Justice with its superior resources cannot do so as well.

B. Department of Housing and Urban Development.

Prior to the recent enactment of the Fair Housing Amendments Act of 1988, the Department of Housing and Urban Development had little meaningful authority to enforce any of the fair lending or community reinvestment laws. Rather, HUD's only statutory responsibility in the equal credit area was to receive and investigate housing finance discrimination claims and "try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion."[124] The secretary was not even permitted to engage in these conciliatory activities if the housing finance complaint arose in a jurisdiction with a state or local fair housing law substantially equivalent to the Fair Housing Act.[125]

Thus, HUD has not been a significant player in the enforcement of equal lending and community reinvestment laws, even Title VIII. It has conducted no recent studies or compiled any data relating to its investigation or conciliation of complaints alleging violations of the housing finance provisions of Title VIII.[126] None of HUD's annual reports between 1980 and 1986 even mention its investigation and conciliation efforts relating to complaints of housing finance discrimination. None of HUD's Voluntary Affirmative Marketing Agreements have involved financial institutions or their trade associations. Equal access to housing credit, therefore, is not at the forefront of HUD's efforts to enforce the Fair Housing Act.

HUD could have made a significant contribution to the interpretation of Title VIII's prohibition against discrimination in the financing of housing if it had issued comprehensive regulations relating to that topic. The promulgation of regulations by other federal agencies in their particular areas of expertise has been recognized as an invaluable tool in the enforcement and interpretation of civil rights legislation.[127] HUD did submit Title VIII interpretative regulations to Congress in 1980, but those regulations were withdrawn soon after the Reagan administration took control of the White House. Fortunately, other federal regulatory agencies, in particular the Federal Reserve Board through Regulation B,[128] and the Federal Home Loan Bank Board in its nondiscrimination regulations,[129] have adopted strong, comprehensive fair lending regulations that have filled the gap left by HUD's inactivity in the housing finance area.

HUD can substantially improve its enforcement efforts after the Fair Housing Amendments Act of 1988 takes effect. Whether it does so will depend upon the commitment of the new administration to fair housing matters, generally, and to equal access to credit in particular.

C. Financial Supervisory Agencies.

Five federal regulatory agencies, with general supervisory responsibility over financial institutions, enforce certain fair lending and community reinvestment laws: the Board of Governors of the

Federal Reserve System, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, and the National Credit Union Administration. These agencies are charged with enforcement of the Equal Credit Opportunity Act,[130] the Home Mortgage Disclosure Act,[131] and, except for the National Credit Union Administration, the Community Reinvestment Act.[132]

1. *Community Reinvestment Act.*

None of the financial regulatory agencies have vigorously enforced CRA.[133] Prior to enactment of CRA, the agencies focused their efforts exclusively on monitoring the financial "safety and soundness" of the institutions they regulated, and generally ignored those institutions' commitment to neighborhood reinvestment.[134]

Despite the enactment of strong fair lending laws and Congress' clear expression of federal policy that discriminatory lending practices should be eliminated, the federal financial supervisory agencies did little or nothing throughout most of the 1970s to implement or enforce this national priority.

The Senate Banking Committee (in 1977) harshly criticized the regulatory agencies for not promulgating anti-redlining regulations.[135] Indeed, during the congressional hearings that led to passage of the CRA, the agencies discounted any evidence that redlining existed and, although they acknowledged that lenders were not meeting community credit needs, resisted the philosophy of CRA.[136] Only after being sued by a coalition of civil rights groups did the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board promulgate regulations to enforce and monitor compliance with Title VI, the Fair Housing Act, ECOA, and the Community Reinvestment Act.

At first, it appeared as though the federal regulators would wield their new CRA enforcement duties with sufficient vigor to squarely address the problem of credit unavailability in urban neighborhoods. The first decision by a federal supervisory agency to deny a bank's application on CRA grounds is reported to have "sent shock waves through the banking community."[137] Several early rulings by the Comptroller of the Currency hinted at an active enforcement program.[138] Although not required by the statute itself, federal agencies promulgated regulations which permit individuals and community interest groups to challenge on CRA grounds a lender's application for approval to expand its service area.[139] This "CRA protest" procedure provides an extremely powerful tool to fair lending advocates wishing to challenge an institution's lending policies and practices. Indeed, use by community organizations of the CRA protest procedure has been the single major method of enforcement of the federal policy against discriminatory lending practices affecting older, minority, urban neighborhoods.[140]

In recent years, however, the CRA enforcement efforts of the regulatory agencies have been harshly criticized. Studies by the General Accounting Office, a house subcommittee, and others, found that administrative enforcement efforts were not being used regularly and effectively to promote CRA compliance.[141]

In hearings before the Senate Committee on Banking, Housing, and Urban Affairs conducted in March, 1988, fair housing advocates and researchers were united in their criticism of the financial regulatory agencies.[142] Statistics submitted by the agencies and their critics demonstrated that the CRA rating system[143] used by the agencies is misleading, ineffective, and arbitrary.[144] The agencies' examination procedures were shown to be ineffective because CRA and fair lending issues are not deemed to be important, examiners are not adequately trained in CRA and fair lending matters, too few resources are allocated to the CRA portions of examinations, and the examinations are conducted too infrequently.[145] Agency procedures to evaluate CRA challenges to a lender's application to expand its service area are weak, inherently deficient, and often inconsistently followed.[146]

Despite their poor record and the many examples of weak enforcement, the federal regulatory agencies argue that (1) they are adequately enforcing the Community Reinvestment Act and its implementing regulations and (2) there is no redlining or lending discrimination "problem" in the country. This latter belief is clearly expressed in statements made by the regulators during the 1988 CRA Oversight Hearings. The Comptroller of the Currency, for example, believes that "banks historically have helped to meet local community credit needs, consistent with safety and soundness requirements, and they continue to do so."[147] The FDIC expressed its belief that "FDIC-supervised banks are in substantial compliance with the requirements of the CRA and Part 345 of the FDIC's regulations."[148]

These comments perhaps underscore the folly of having CRA and equal credit compliance monitored by regulators whose interests are too closely tied to the institutions they regulate. For example, examiners and supervisory staff work for the regional Federal Home Loan Banks. The boards of directors of the regional Banks, however, are filled with officials of the savings and loans institutions that are being examined. Moreover, the agencies are responsible for insuring deposits, supervising loan activities, and generally insuring the safety and soundness of depository institutions. Thus, the health and welfare of the industry itself is the agencies' primary concern, not the elimination of discriminatory policies and practices.

All of this is not to say that enactment of the Community Reinvestment Act was a mistake, or that some of its purposes have not been fulfilled. To the contrary, in contrast to attitudes of ten years ago, both lenders and the agencies now readily acknowledge that lenders have an affirmative obligation to meet the credit needs of low- and moderate-income neighborhoods and to provide access to adequate credit in those neighborhoods. As one commentator has cogently observed, in the ten years since the CRA was passed "the banking officials and regulators who, prior to 1977, resolutely and unapologetically denied that they had any responsibilities to serve the credit needs of local communities, are now in the position of explaining how they are doing enough to fulfill those responsibilities."[149]

Moreover, the use by private community organizations of the CRA protest procedure has resulted in a tremendous amount of reinvestment in traditionally redlined or disinvested neighborhoods. Experts have estimated that since CRA was passed, private community organizations have used the Act and its protest procedure to negotiate almost $5 billion in additional credit to those neighborhoods.[150] More than once it has been observed that the driving force behind the successful implementation of the CRA's purposes has been activist community organizations.[151]

The point to be made, however, is that the federal financial supervisory agencies, which, rather than community organizations, are charged with the primary statutory responsibility for enforcement of the Community Reinvestment Act, are not fulfilling their statutory obligations.

2. *Equal Credit Opportunity Act.*

The federal agencies' efforts to enforce compliance with ECOA appear to be better than under CRA. For example, both the Federal Home Loan Bank Board and the Federal Reserve Board have promulgated nondiscrimination requirements that are broad, comprehensive and strong. Some of the agencies--particularly the Federal Reserve Board and the Federal Trade Commission--regularly issue cease and desist orders, and initiate enforcement actions against lenders who are found in violation of ECOA. For example, between 1980 and 1987 the agencies initiated approximately forty formal enforcement proceedings, including cease and desist orders, against lenders found to be in violation of ECOA.[152]

The Federal Trade Commission appears to be the most vigorous enforcer of ECOA.[153] It regularly conducts investigations into practices that it considers to be serious violations of ECOA,[154] and has initiated one or more enforcement proceedings each year since 1982.[155] In 1984 the FTC brought the first enforcement action under ECOA to challenge restrictive loan terms to the elderly on the grounds that the restrictions were not reasonably related to creditworthiness.[156] The FTC has also implemented and regularly uses statistical analysis and "testing" to ferret out ECOA violations.[157]

VII. Emerging Issues and Challenges/Recommendations

This section identifies the emerging issues and challenges the next administration must face if it truly desires to eliminate remaining artificial barriers to credit in housing and consumer finance transactions. This section makes specific recommendations for improving the present statutory, regulatory, and enforcement framework so that the new administration can more effectively enforce the nation's policy against discriminatory lending practices.

A. Simplify the Statutory Framework and Place Enforcement Authority In One Federal Agency.

Congress has, over time, built an extremely confusing and complicated statutory framework in its effort to eliminate discriminatory lending practices. Federal enforcement of the fair lending and community reinvestment laws is expensive, inefficient and, for the most part, ineffective.

The current scheme must be simplified. This could be accomplished by, for example, enacting legislation that amalgamates into one statute relating solely to discrimination in the financing of housing all of the best features of the Equal Credit Opportunity Act, the Home Mortgage Disclosure Act, the Community Reinvestment Act, the financing section of the Fair Housing Act, and related provisions from other laws and executive orders. The Equal Credit Opportunity Act itself would remain largely intact, but could be limited to consumer transactions only. In this way two laws could do the same job that half a dozen do now, and there would be no overlap.

Regulatory and enforcement authority should be placed in one federal agency, or two if consumer credit and home financing are treated separately by statute. Given the federal financial agencies' historical reluctance to enforce the fair lending and community reinvestment laws with sufficient vigor, the Department of Housing and Urban

Development is the most logical choice to enforce any and all laws relating to home finance discrimination and community reinvestment. The Federal Trade Commission could be charged with responsibility for enforcing any laws relating to discrimination in consumer credit transactions. All applicable substantive, procedural, and reporting regulations, which hopefully would include at least those currently on the books, should be promulgated by only one or two of these enforcing agencies. This system would substantially improve the current legal framework by eliminating the redundancies, inefficiencies, gaps, and complexities that now exist.

There are other alternatives to be sure, but some unification is imperative. Even if a radical restructuring is not feasible, the existing scheme can and must be improved. Some specific suggestions follow.

B. Expand Statutory Coverages.

Because of the patchwork nature of the federal statutory scheme relating to credit discrimination issues, particularly discrimination in the financing of housing, there are many gaps and ambiguities in coverage, both with respect to the type of activities covered and with respect to the institutions subject to the laws. What follows are specific proposals for filling the major statutory gaps that remain.

1. The Fair Housing Act.

Even with recent changes implemented by the Fair Housing Amendments Act of 1988, there are some aspects of the Fair Housing Act, as it pertains to discrimination in home financing, that need to be addressed.

The advertising and marketing efforts of a lender can have a profound impact on the extent to which its loan products are made available to the classes of persons protected by the equal lending laws, yet it is unclear whether a lender's advertising or marketing programs that are directed primarily to white, upper-income applicants as opposed to minority, lower-income persons violate the Fair Housing Act.[158]

Accordingly, the Act should be amended to make clear that lenders have an affirmative obligation to market their residential real estate related products to minorities and minority neighborhoods.

Second, it remains unclear whether the Act prohibits discriminatory practices of private mortgage and homeowners insurers. Federal courts are currently split on the issue of whether geographic redlining by hazard or fire insurance companies is a violation of the Act. Many states now expressly prohibit such discrimination in the sale of fire or homeowners insurance.[159] Fair housing advocates believe that private mortgage insurance companies have imposed artificial and discriminatory underwriting restrictions on mortgage insurance applicants. The Act should therefore be amended to expressly prohibit discriminatory policies, practices, and activities of private mortgage and homeowners insurers.

2. Home Mortgage Disclosure Act.

The Home Mortgage Disclosure Act has proved to be an invaluable tool in identifying discriminatory lending patterns. Its two major flaws, however, must be corrected.

The first weakness of HMDA is that it applies only to depository institutions, and does not apply to mortgage companies that are unaffiliated with such institutions. Except for the fact that mortgage companies have not been historically regulated by the federal government, there is no reason why they should be exempt from HMDA's reporting requirements. HMDA's purposes are to deter redlining practices and to identify those lenders who are engaged in discriminatory practices. Including mortgage companies within the Act's coverage is consistent with these purposes. Moreover, with the recent expansion of the Act by Congress to include mortgage companies that are affiliated with depository institutions, there now exists a legislative distinction in the mortgage banking industry that is artificial, unnecessary, and competitively inhibiting. The Act should therefore be amended to include all mortgage companies.

The second major flaw of HMDA is that it does not require the collection, compilation, or reporting of applications data. Only the Federal Home Loan Bank Board collects data on applicant flow. Such data is necessary to measure properly each institution's loan approval rate in the protected categories and to measure the demand for mortgage loans, both throughout the community and on an institution-by-institution basis. Nor does HMDA require the compilation and reporting of loan file data, such as length of employment, credit ratings, income to debt ratios, and other important underwriting factors. Such data should also be made available, subject to protecting the confidentiality of the identity of mortgage loan applicants.

These refinements to HMDA will significantly improve the amount of data publicly available to analysts, researchers and watchdog groups. They will also clarify the extent of the mortgage lending problem in the country and identify which particular lenders are engaged in discriminatory practices.

3. *Community Reinvestment Act.*

As with HMDA, the Community Reinvestment Act does not apply to mortgage companies because they are not depository institutions. There is no reason, however, to exclude mortgage companies from the reach of CRA. They, like depository institutions, should be obligated to meet the credit needs of their communities. Enforcement of CRA against mortgage companies could be delegated to the Federal Trade Commission, which currently enforces ECOA as it applies to mortgage companies.

In addition, to assist and monitor the regulators and to acknowledge the significant importance of private community involvement in the enforcement of CRA, an additional enforcement mechanism should be made available to community groups. Currently the only private means of "enforcing" CRA is to await the filing of a lender's application for approval with a federal financial supervisory agency, and then to challenge that application through the CRA protest procedure. There is neither a method available to appeal the federal agency's decision nor a method of challenging a lender's CRA performance in the absence of an application.

This shortcoming of the CRA can be remedied in a number of ways. The first option is to provide a private cause of action to any bonafide community organization that wishes to challenge a lender's CRA performance. This could be done either through an administrative enforcement scheme or through the courts. Another option is to provide protesting community groups with a right to appeal a federal agency's decision. Once again, the appeal can be either an administrative one to a special appeals panel within the agency itself or directly to a court. Whatever method is eventually adopted, there should be a provision explicitly providing legal standing to community or fair lending advocates who participate in the process.

Another improvement suggested by fair lending advocates to the Act itself is a prohibition against any residential mortgage loan underwriting policy, pricing policy, or product that has a discriminatory effect on low income applicants, such as minimum loan amounts or the tiering of interest rates or closing costs based upon the size of the loan. Such policies are already prohibited by Title VIII and ECOA to the extent that they have an adverse impact on protected groups, but those low-income persons who do not fall within any of the protected categories cannot claim the protection of those laws. Yet the Community Reinvestment Act is specifically designed to protect the interests of all low-income persons, not just those covered by the nondiscrimination statutes.

B. Regulators and Regulations.

In addition to the legislative issues and needs identified above, many perceived defects in federal agency enforcement efforts must be addressed.

1. *Department of Justice.*

The Department has lacked vigorous involvement in litigation regarding equal credit issues. In addition to the statutory impediments to these efforts (such as a lack of subpoena power under Title VIII), there are intradepartment deficiencies that ought to be remedied. First, the amount of staff dedicated to equal credit issues should be increased. Second, the Department should return to its former division of labor, whereby a separate credit subsection handles only credit-related matters. Credit discrimination is more complex and requires a good deal of training and expertise, more so than in other fair housing fields. It would appear to be more efficient to have specialists dedicated to this particular subject area. Third, the Department should actively use the investigative tools used by private fair lending advocates to identify lending discrimination, including the collection and analysis of lending data and the use of testing. The Department should be able to work closely with other federal regulatory agencies that have access to such data or who have testing programs in place.

2. Department of Housing and Urban Development.

It is anticipated that with passage of the new Fair Housing Amendments Act of 1988 HUD will be able to increase its enforcement efforts in all areas of housing discrimination, including finance discrimination. Interpretative regulations must be sensitive to the issue that discrimination in financing is more difficult to detect and to challenge than discriminatory rental, sales, and steering practices. The regulations the federal financial supervisory agencies promulgated under the authority of Title VIII, ECOA, HMDA, and CRA should be of some assistance to HUD, but those regulations are not sufficient in themselves because they apply only to lending institutions subject to federal financial supervision. Other entities subject to Title VIII and ECOA, such as unaffiliated mortgage companies and finance companies, need further specific direction in the form of regulations from HUD.

3. Federal Financial Supervisory Agencies.

Many suggestions have been made for improving the non-discrimination and community reinvestment enforcement efforts of the federal financial supervisory agencies. These suggestions, along with others that have application broader than just CRA, include the following:

- Regulations need to be updated. Most of the present regulations were promulgated almost a decade ago before the effects of deregulation were felt. With the exception of the Federal Reserve Board's regular evaluation of Regulation B, none of the other regulations have been reviewed to any great extent. This is probably an indication of the relatively low priority nondiscrimination in lending has received by the agencies over the past decade. Although some of the regulations are fairly strong, particularLy Regulation B and those promulgated by the Federal Home Loan Bank Board, they should nevertheless be reviewed, cleaned up, and, if necessary, strengthened.

- The CRA ratings system must be revised and ratings made public. In 1983, the Citizens Advisory Council of the Federal Reserve Board unsuccessfully recommended that the system be overhauled. The current ratings system is generally perceived as meaningless since almost all examined institutions are given high ratings, and the ratings themselves are kept secret from the public.

- The CRA examination process must be improved. The examination process as it relates to an assessment of a lender's compliance with the CRA is deficient. The current process emphasizes too heavily safety and soundness concerns and virtually ignores nondiscrimination and community reinvestment performance. As with ratings, the results of examinations should be made public, with respect to CRA issues.

- CRA protest procedures should be standardized and improved. Each agency has its own CRA protest procedure, often inconsistently followed. Longer periods for public comment are needed, and public hearings should be utilized more frequently.

- "Testers" should be used to monitor compliance. Testing has proven to be an invaluable tool for the identification and investigation of other forms of prohibited discrimination. The Federal Trade Commission utilizes testing procedures to check for violations of ECOA. There is no reason why the financial supervisory agencies cannot establish a testing program.

- Data collection procedures and improved data analysis should be implemented. The agencies' data collection procedures should be reviewed to insure that the agencies are collecting all relevant information from the regulated institutions. What data the agencies do have should be exhaustively analyzed, used to identify lender violations or shortcomings, and made public. The Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Reserve Board should collect and analyze the same data that the Federal Home Loan Bank Board currently collects, particularly applications data. The agencies should also aggregate the data collected from each SMSA to determine if, and identify which, urban neighborhoods in the SMSA are not having their credit needs met.

- Advisory boards should be established to assist the agencies. One of the long-standing criticisms of the federal financial supervisory agencies' enforcement of nondiscrimination laws is the incestuous relationship between the agencies and the institutions they regulate. Hence, the agencies themselves should be watched by consumer advisory panels who can make specific recommendations with respect to the enforcement of nondiscrimination and community reinvestment laws. The Citizens Advisory Council performs such a valuable function for the Federal Reserve Board. Many members of the CAC have expressed strong support for the wider use by other regulatory agencies of advisor groups similar to the CAC.[160]

C. Private Enforcement.

The strongest efforts to enforce the nation's credit discrimination and community reinvestment laws have come from private individuals, fair lending advocates, and neighborhood community groups. Although the focus of this paper has been on the strengths and weaknesses of federal enforcement of those laws, impediments to private enforcement do exist. Those impediments have been identified (in part A above) in the discussion of each of the equal credit and community reinvestment statutes. Continued vigorous enforcement in the private sector depends heavily on those suggested improvements being made.

CHAPTER XVII

FEDERAL FAIR HOUSING ENFORCEMENT: A CRITIQUE OF THE REAGAN ADMINISTRATION'S RECORD AND RECOMMENDATIONS FOR THE FUTURE

by Professor Robert G. Schwemm

Introduction

Nineteen eighty-eight was the most important year for fair housing in two decades. Not since the watershed year of 1968, when Congress passed the Fair Housing Act and the Supreme Court decided *Jones v. Alfred H. Mayer Co.*, have so many significant developments occurred. The most important of these developments was the passage of the Fair Housing Amendments Act of 1988. In addition, the nation's attention was focused on the problem of segregated housing by the publicity generated by the *Yonkers* and *Starrett City* cases. Throughout the year, the presidential campaigns of both major parties strongly suggested that the new administration would be more committed to civil rights values than its predecessor. In short, events in 1988 have set the stage for what promises to be a new era, in which fair housing--historically the forgotten step-child of civil rights--may well become the major battleground of civil rights enforcement in the 1990s.

This chapter is intended to provide a blueprint for policy decisions by the new administration in the fair housing area. Part I contains an overview of the fair housing laws and the problems of discrimination and residential segregation they were intended to address. Parts II and III analyze the respective roles of the Department of Justice and the Department of Housing and Urban Development in fair housing enforcement. Conclusions and recommendations are set forth in Part IV.

I. Overview

A. The Legal Context

The modern era of fair housing law began with two events in 1968: (1) passage of the federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968),[1] which bans discrimination on the basis of race, color, religion, national origin, and sex in most housing transactions, and which provides for governmental as well as private enforcement;[2] and (2) the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*,[3] which held that private, as well as public, racial discrimination in housing is also banned by the Civil Rights Act of 1866.[4]

The enactment of Title VIII and the new interpretation of the 1866 Act meant that for the first time, the private housing market--and thereby the means by which most Americans secure housing--was subject to federal laws that prohibited discrimination. Prior to 1968, the Constitution and other laws had banned certain forms of governmental housing discrimination, such as racial restrictive covenants.[5] It was not until 1968, however, that the legal tools became available to attack all forms of housing discrimination and that the period of continuous, active fair housing litigation began.

B. Title VIII: Methods of Enforcement[6]

The 1866 Civil Rights Act relies exclusively on private lawsuits for its enforcement.[7] The 1968 Fair Housing Act, on the other hand, provides for three different methods of challenging discriminatory housing practices: (1) suits by the attorney general in "pattern or practice" and "general public importance" cases under Section 813;[8] (2) administrative complaints to HUD filed by aggrieved persons pursuant to Section 810, which may lead to proceedings in state or local "referral" agencies and eventually to federal court suits by the complainants;[9] and (3) direct court actions brought by private plaintiffs under Section 812.[10] A fourth category of litigation generated by the

Act-- private suits against HUD for violating its affirmative fair housing duties under Section 808[11]--is not explicitly authorized by the statute, but can be pursued under the Administrative Procedure Act.[12]

The power of the federal government to challenge discriminatory housing practices is limited. The 1968 Act authorizes the attorney general to sue only in two situations: (1) when the defendant has engaged in a "pattern or practice" of discrimination; and (2) when a group of persons has been discriminated against in a way that "raises an issue of general public importance."[13] These phrases limit the Justice Department to prosecuting cases that have "a measurable *public* impact."[14] Even in its most active period when Title VIII was new, the Justice Department filed only about 32 fair housing cases per year.[15] At that time, the Supreme Court characterized the Department's role in enforcing fair housing as "minimal."[16]

By way of contrast, the number of Section 810 complaints received by HUD every year has grown into the thousands. In 1979, over 2,800 administrative complaints were filed, and that figure had grown to almost 4,700 by 1987.[17] HUD refers many of these complaints to the thirty-six states and the seventy-two localities whose fair housing laws are "substantially equivalent" to Title VIII[18] and processes the rest. Under the 1968 Act, HUD has thirty days to investigate a Section 810 complaint, after which it may attempt to resolve the dispute, but only by using "informal methods of conference, conciliation, and persuasion."[19]

This limitation is significant. It means that the agency procedure authorized by Title VIII provides for absolutely no sanctions against a recalcitrant defendant. In its first review of the 1968 Fair Housing Act, the Supreme Court concluded that "HUD has no power of enforcement."[20]

Nevertheless, thousands of persons aggrieved by discriminatory housing practices bring their complaints to HUD every year. They cannot be using Section 810 because it allows them to end up in a state or local agency or, if all else fails, in federal court, for these options are available directly without the need for a prior Section 810 complaint. From a litigator's point of view, the advantages of a Section 810 proceeding are hard to fathom.[21] However, most people are not litigators. They may not know what their most effective legal options are, or they may be attracted by the simplicity and ease of filing a HUD complaint compared with the hassle and expense of consulting a lawyer and prosecuting a lawsuit. Whatever the reasons, far more Section 810 complaints have been filed over the years than private lawsuits under Title VIII.

The third enforcement method authorized by the 1968 Act is a court action under Section 812. This provision is independent of Section 810. A victim of discrimination may proceed directly to court without first filing a HUD complaint or otherwise pursuing his administrative remedies.[22] A Section 812 suit may be brought in federal or state court, and the court may award equitable relief, actual damages, punitive damages up to $1,000, and costs and attorney's fees if the plaintiff is financially unable to assume them.[23] The availability of these remedies makes Section 812 actions a much more effective enforcement technique than Section 810 proceedings.

Because of the limitations on Justice Department suits and on HUD enforcement, Title VIII has been primarily dependent on private litigation for its enforcement.[24] Private plaintiffs have been responsible for the vast majority of reported cases dealing with the Fair Housing Act over the past twenty years, including all of the Title VIII cases decided by the Supreme Court and most of the major lower court decisions.[25] Generally, these decisions have created a strong body of precedent that has given a broad and generous interpretation to the statute.[26] In helping to establish these precedents, private litigants have acted, in the words of the Supreme Court, "not only on their own behalf but also as private attorneys general."[27]

There are some serious drawbacks, however, to relying so heavily on private litigants for enforcement of the Fair Housing Act. [28] Many victims of housing discrimination do not even realize they have been accorded discriminatory treatment. Even if homeseekers do understand that they have been treated unfairly, they may not want to go through the hassles of finding a lawyer and filing a lawsuit. In addition, proving a fair housing case may be difficult unless a "tester" has been sent to try to deal with the defendant shortly after the plaintiff has been discriminated against.[29] Finally,

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even if a discriminatory practice can be proved, the rewards for prosecuting a fair housing case have traditionally been quite small, with damage awards usually falling in the $500-to-$10,000 range.[30]

The result is that relatively few fair housing cases have been filed. The total number of reported federal court decisions involving housing discrimination is now about four hundred. Over a twenty-year period, that averages out to about twenty reported cases per year or less than two each month, far fewer than, say, the number of reported employment discrimination cases.

C. Residential Segregation and Discrimination in America's Housing

Housing in the United States continues to be characterized by alarmingly high levels of racial segregation and unlawful discrimination. Thus far, fair housing laws have failed to change these deep-seated patterns in any significant way. Demographic studies based on the 1980 census show that residential segregation is still near the levels that existed when Title VIII was enacted. Segregation in a particular community is commonly measured on a 100-point scale, with 100 indicating total segregation (that is, all blacks and all whites live in racially homogenous areas) and zero indicating a population that is randomly distributed by race. Using this measure, the overall segregation index in 1980 was 77 for the nation's 17 largest metropolitan areas with over 250,000 blacks.[31] This represents a drop of only 5 points from 1970 in these 17 locations, which account for 60 percent of the nation's urban black population.[32] Even in the least segregated of these metropolitan areas, such as San Francisco and Washington, D.C., the 1980 segregation index was approximately 70.[33] In other areas such as Chicago, Detroit, and Cleveland, racial isolation is so high, the 1980 segregation index was near 90.[34]

Residential segregation of Asians and Hispanics in these metropolitan areas appeared to be substantially lower. The overall 1980 figure for Asians was 43.[35] The comparable figure for Hispanics was 48,[36] but there is some confusion surrounding this figure. Older census data classified the majority of Hispanics as "white."[37] In recent years, studies in many cities have indicated that dark-skinned Hispanics face levels of housing discrimination comparable to those experienced by blacks.[38] A better understanding of Hispanic residential segregation, therefore, would require that the modern data be analyzed according to skin-color sub-groups.

The history of racial segregation in America's housing can be traced back to the early years of this century, when significant numbers of young blacks began to migrate from the rural South to the urban areas of the North.[39] Initially, these blacks lived in areas with other poor ethnic groups. By the end of the 1920s, however, whites who controlled the housing industry had implemented a series of techniques (for example, racial zoning, restrictive covenants, and discriminatory sales, rental, and financing practices) that confined the black population to certain specified areas.[40] In the 1930s, these forms of institutionalized segregation were reinforced by federal policies that embraced racial discrimination in federally-assisted housing and that, like the realtors' code of ethnics of that time, sought to protect white neighborhoods from the "infiltration of inharmonious racial groups."[41]

During the 1940s, 1950s, and 1960s, industrial expansion and continued urbanization brought millions of new black families to the nation's cities, in the South as well as the North.[42] This second wave of black migration also was confined to certain areas within the central cities. Isolated instances of integrative moves occurred, but the primary method of opening new housing opportunities to blacks was to expand the ghetto by "blockbusting" adjacent neighborhoods.[43] The degree of racial isolation accelerated. In the decade from 1960 to 1970, for example, every geographic region in America experienced an increase in residential segregation by race.[44]

Thus, the segregated housing patterns that existed when the 1968 Fair Housing Act was passed were the well-entrenched product of a half-century of institutionalized racism by both public and private entities. Against this background, it was perhaps naive to suppose that these residential patterns, and the forces that created and maintained them, would immediately be reversed simply with the passage of a new law. The nation in the late 1960s was, in the words of the National Advisory Commission on Civil Disorders, "moving toward two societies, one black, one white--separate and unequal."[45] As the Supreme Court observed in its first Title VIII case, the task of providing for fair housing throughout the United States was enormous.[46]

Still, the degree to which segregated housing patterns have persisted in the modern era is discouraging. Over the thirty-year period ending in 1980, the average level of residential segregation between blacks and whites declined by only seven percentage points in the nation's twenty-five largest cities.[47] Meanwhile, other areas addressed by civil rights laws, such as public accommodations, education, and employment, have yielded much greater results in terms of blacks being integrated into previously segregated systems. Housing has proved to be "the last major frontier in civil rights" and the area most resistant to legal change.[48]

Difficult as housing integration may be to achieve, it is clear that this goal was important to the Congress that enacted the 1968 Fair Housing Act. Proponents of Title VIII, in both the Senate and House, repeatedly argued that the new law was intended not only to expand housing choices for individual blacks, but also to foster racial integration for the benefit of all Americans. For example, Senator Mondale, the principal sponsor of the Fair Housing Act, decried the prospect that "we are going to live separately in white ghettos and Negro ghettos."[49] The purpose of Title VIII, he said, was to replace the ghettos "by truly integrated and balanced living patterns."[50] On the House side, Congressman Celler, the Chairman of the Judiciary Committee, spoke of the need to eliminate the "blight of segregated housing and the pale of the ghetto,"[51] and Congressman Ryan saw Title VIII as a way to help "achieve the aim of an integrated society."[52] Aware of the conclusion of the Commission on Civil Disorders that the nation was dividing into two racially separate societies, Congress clearly intended Title VIII to remedy segregated housing patterns and the problems associated with them--segregated schools, lost suburban job opportunities for minorities, and the alienation of whites and blacks caused by the "lack of experience in actually living next" to each other.[53] The intended beneficiaries of Title VIII were not only blacks and other minority groups, but, as Senator Javits said in supporting the bill, "the whole community."[54]

Why, then, has the 1968 Fair Housing Act failed to substantially alter the segregated housing patterns of America's metropolitan areas? Two principal reasons have been given. The first is that housing segregation has a variety of causes other than discrimination and therefore does not diminish in tandem with diminishing discrimination.[55] According to this view, segregation results primarily from economic differences (that is, blacks generally cannot afford the full range of housing that is open to whites) and from personal preferences (that is, blacks generally prefer to live in neighborhoods that have more blacks than the neighborhoods whites prefer to live in).[56] This theory contends that segregated housing patterns will continue even though all racial discrimination is eradicated.

The other view is that racial discrimination continues to play a major role in maintaining residential segregation, despite the 1968 Act's commands to the contrary. Certainly, there is abundant evidence of the continuing nature of housing discrimination. In the late 1970s, a major national study covering forty metropolitan areas concluded that a black homeseeker who visits four real estate agents will encounter at least one instance of discrimination 72 percent of the time for rentals and 48 percent of time for sales.[57] Later regional studies from Boston, Denver, and the Washington, D.C. area showed similarly high levels of discrimination persisting into the 1980s.[58] In 1987, the Department of Housing and Urban Development estimated that 2,000,000 instances of housing discrimination were still occurring every year.[59]

Experts tend to agree that segregation has multiple causes, but they differ as to the relative importance of these causes.[60] Economics has some role to play, but it is perhaps the least important factor. Studies show that "blacks of every economic level are highly segregated from whites of the same economic level."[61] Furthermore, black-white segregation at every income level is substantially greater than the segregation of other ethnic groups.[62] The personal preference factor of wanting to live where one's own race predominates can be a powerful force, but it is important to recognize that such preferences are a culturally-taught phenomenon. For half a century, before passage of the Fair Housing Act, public and private agencies were hard at work teaching Americans that residential integration was inappropriate. Some still are.

These considerations, along with the evidence of continuing discrimination, have led most experts to conclude that the economics-personal preference explanation for continuing segregation is too simplistic. For example, Professor Karl Taeubar, one of the nation's foremost authorities on racial demographics, recently wrote that "deeply institutionalized racism perpetuates residential segregation."[63] Another highly-respected authority, Professor George Galster, concluded in a 1986 paper that housing discrimination "was likely responsible for a significant portion of the extent and pattern of racial segregation observed in metropolitan areas. . . . The potential payoffs for effectively enforced fair housing policies are thus manifest."[64]

This view was also shared by the Congress that passed the Fair Housing Amendments Act of 1988. The underlying assumption of the 1988 Amendments Act is that the enforcement mechanisms of Title VIII were too weak to effectively combat housing discrimination in this country.[65] The new law is an effort to make the 1968 Act's promise of non-discrimination in housing a reality, so that Americans will finally have a *real* opportunity to decide if they prefer to live in "truly integrated and balanced living patterns."[66]

D. The Fair Housing Amendments Act of 1988

This section provides a brief description of the major provisions of the Fair Housing Amendments Act of 1988 (Pub. L. 100-430). A more detailed review of the background and substantive provisions of this new law is contained in the Appendix.[67]

The passage of the 1988 Fair Housing Amendments Act is the most important development in housing discrimination law in twenty years. The Amendments Act creates a new enforcement mechanism for handling administrative complaints, adds families with children and the handicapped to the groups protected by the law, and makes a number of other significant changes in coverage, procedures, and remedies. The Act was passed by overwhelming margins in the House and the Senate during the summer of 1988.[68] It was signed by President Reagan on September 13, and, because the effective date is 180 days after enactment, the new provisions took effect on March 12, 1989.[69]

The Amendments Act extends Title VIII's basic substantive provisions to the handicapped and families with children.[70] In addition, two specific sections dealing with handicap discrimination require landlords to allow handicapped renters to make reasonable modifications to the premises and require that future multifamily buildings include certain design features to guarantee handicap accessibility.[71] An exception to the ban on familial status discrimination is provided for three specified classes of "housing for older persons."[72]

The procedures and remedies available in complaints to HUD have been totally reformed by the new law. The new system is complicated, but its basic features are as follows: Complaints that are not referred to "substantially equivalent" state or local agencies must be investigated by HUD within 100 days.[73] Within this 100-day period, HUD is required to file a written investigative report and to determine whether reasonable cause exists to believe that a discriminatory housing practice has occurred.[74] Also during this period, HUD is directed to engage in conciliation efforts with the respondent and the complainant.[75] If conciliation is unsuccessful and if a "reasonable cause" determination has been made, HUD will issue a formal charge on behalf of the complainant.[76] At this stage, either party may "remove" the case to the federal district court, where the complainant will be represented by the Justice Department and may receive actual and punitive damages and appropriate equitable relief.[77] If the case is not removed, it shall proceed to a hearing before an administrative law judge not later than 120 days after the charge has been filed.[78] The judge is required to decide the case within 60 days after the hearing and may award actual damages, injunctive relief, civil penalties of up to $50,000, and attorney's fees.[79] These decisions are subject to administrative and judicial review.[80] The clear intent of this system is to provide for expeditious handling of cases and for a full range of serious sanctions and remedies.

The new law not only requires the Justice Department to prosecute HUD charges that have been removed to federal court, it also expands Justice's authority to file fair housing cases of its own.[81] Furthermore, the relief available in these cases has been broadened beyond equitable remedies to include civil penalties of up to $100,000 and "monetary damages to persons aggrieved."[82] This latter provision specifically overrules a line of cases that had interpreted the old law to prevent the attorney general from obtaining damages for individual victims of housing discrimination.[83]

Obviously, the new responsibilities imposed on HUD and Justice by the Amendments Act are immense. In mid-1988, the Congressional Budget Office estimated the maximum annual cost for staffing and other expenditures associated with these new responsibilities to be $3 million for HUD and $3 million for Justice.[84] These estimates seem extremely modest, given the vast amount of new work that will be required of HUD and Justice.

The new Fair Housing Act preserves the private complainant's option of bypassing HUD and proceeding directly to court.[85] Indeed, the new law makes this option more appealing by eliminating certain restrictions on private lawsuits. The statute of limitations for private cases has been extended form 180 days to two years, the $1,000 limit on punitive damages has been removed, and attorney's fees may be awarded even if the plaintiff is financially able to assume them.[86]

These provisions will make the relief available under the Fair Housing Act comparable to what is already available in race cases under the 1866 Civil Rights Act. This means that the 1866 Act will be less important in housing cases, since its principal contribution up to now has been its more generous relief provisions. As a result, the Supreme Court's recent decision to "reconsider" the meaning of the 1866 Act in *Patterson v. McLean Credit Union*[87] should not harm future fair housing plaintiffs. Even if the Court ultimately gives a narrow interpretation to the 1866 Act, the new Fair Housing Act will provide for full relief.

The Amendments Act makes a number of other important substantive changes in Title VIII. For example, Section 805's ban on discrimination in residential financing has been completely rewritten to cover a broader range of "real estate related transactions."[88] The new provision applies to the secondary mortgage market and to appraisers, although it specifically allows appraisers to consider all relevant nondiscriminatory factors. In addition, the new law makes clear that "interference" claims under Section 817 (now Section 818) may be brought as HUD complaints or as private lawsuits just like any other Fair Housing act claim.[89] The old law provided that these claims could be "enforced by appropriate civil action," but did not specify what this meant.[90] Another important new provision requires HUD within 180 days to "issue rules to implement" the Fair Housing Act as amended.[91] HUD is also required to make annual reports to Congress on the nature and extent of housing discrimination in the United States and on the demographic makeup of people residing in federally-subsidized housing.[92]

A final note should be made about certain major issues that the Amendments Act does *not* resolve, such as whether the Fair Housing Act includes a discriminatory effect standard and whether the Act allows quotas and other race-conscious methods for promoting and maintaining integration. Avoiding these issues was not a mere oversight. Congress considered the arguments of those who wanted these questions addressed and then chose not to do so. The result is that these issues will be left to the courts, which will have to decide them by divining the intent of the 1968 Congress and by making what they can of Congress's 1988 decision to accept the current state of the law. The discriminatory effect and race-conscious issues are discussed, respectively, in Parts II-C-3 and -4 *infra*.

II. Department of Justice

A. Introduction

As discussed in Part I-B *supra,* the 1968 Fair Housing Act limits the attorney general's authority in civil cases to situations that involve either a "pattern or practice" of discrimination or "an issue of general public importance."[93] Under the 1988 Amendments Act, the Justice Department will continue to be able to bring these two types of "public impact" cases (in which civil fines and monetary damages for discrimination victims may be obtained along with full equitable relief), and the Department will also have responsibility for prosecuting civil actions that grow out of private complaints to HUD, for land use cases referred by HUD to Justice, and for certain other litigation matters.[94] In addition to these civil cases, the 1968 Act makes it a crime for anyone to use force or the threat of force to intimidate or interfere with a person exercising his fair housing rights,[95] and the Justice Department also has responsibility for prosecuting these criminal cases.

Throughout Title VIII's twenty-year history, a key policy question has been how the Justice Department would use its limited resources and litigation authority to carry out its fair housing enforcement responsibilities. The Department's response to this question has changed over time, with three distinct periods being observable: (1) 1969-1978; (2) 1978-1980 (the late Carter administration); and 1981-1988 (the Reagan administration). The first two of these periods are reviewed in the next section. The remainder of Part II then deals with the Reagan administration's record. The primary focus is on the civil cases prosecuted under Title VIII and the policies pursued in those cases. A concluding section provides a brief analysis of the Reagan administration's record in criminal cases under the Fair Housing Act.

B. The 1969-1978 and 1978-1980 Periods

In the first decade after passage of Title VIII, the Justice Department's strategy was to bring as many cases as possible, in a number of different geographical areas and involving a wide variety of discriminatory practices (for example, blockbusting, steering, discriminatory rental policies, exclusionary zoning). Three hundred cases, an average of thirty-two per year, were filed between 1969 and 1978.[96] The goals of this strategy were to convince housing providers, municipalities, and other potential defendants that the law would be vigorously enforced and to help to create a body of favorable judicial precedent concerning the new Fair Housing Act.

During this period, Title VIII cases were assigned to a separate Housing Section of the Civil Rights Division of the Department of Justice. The achievements of this Housing Section were noteworthy. It tried a large number of cases and won almost every one. Its cases established important precedents concerning the meaning of Title VIII, including: (1) that Section 804(a)'s "otherwise make unavailable" provision prohibits steering, exclusionary zoning, discriminatory appraisals, and a variety of other discriminatory practices;[97] (2) that Section 804(c)'s ban on discriminatory advertising applies to the carrying media as well as the party who places the ad and extends to "hidden" racial preferences as well as explicit ones;[98] (3) that real estate firms are liable for the discriminatory acts of their agents and employees;[99] (4) that proof of discriminatory effect, as well as discriminatory purpose, can violate the Act;[100] and (5) that broad affirmative orders are appropriate to remedy the present effects of past discriminatory practices.[101] The Justice Department also contributed to the development of Title VIII law by regularly filing *amicus curiae* briefs on behalf of plaintiffs in important privately-initiated cases.[102]

In the latter half of the Carter administration, the Civil Rights Division took a somewhat different approach. Studies during this period indicated that widespread housing discrimination continued to occur on a massive scale and that residential segregation, particularly in large metropolitan areas, was virtually unchanged from the time when Title VIII was enacted.[103] Some doubt was expressed that these patterns could be changed by simply continuing to file a variety of traditional fair housing cases against small operators in the private market.

Instead, the Civil Rights Division decided to focus its fair housing efforts on certain types of "systemic" discrimination cases. A strong emphasis was placed on challenging zoning and other land use practices that blocked federally-subsidized housing developments and thereby prevented minorities from residing in traditionally white areas. Examples of this type of case filed during the last half of the Carter administration included the suits against Birmingham, Michigan, and Yonkers, New York.[104]

The shift to a strategy of focusing on exclusionary zoning and other systemic cases was based on the view that these suits, if successful, would have a greater impact on segregated housing patterns than more traditional suits. In addition, the Department may have concluded that its success in creating a favorable body of judicial precedent meant that further legal developments in traditional cases were of marginal value. In any event, the responsibility for these more traditional cases was "farmed out" to local U.S. Attorneys. Within the Civil Rights Division, fair housing enforcement was made a part of a larger section called "General Litigation," and far fewer Title VIII cases were filed on an annual basis than during the earlier period.[105]

C. The Reagan Administration

1. Civil Cases: New Cases Filed and Organizational Structure

For some time after the Reagan administration took office in January 1981, the Justice Department simply stopped filing fair housing cases. Not a single new Title VIII case was brought in 1981. (The Department's report for Fiscal Year 1981 did include four new suits, but all four were filed in the waning days of the Carter administration.[106]) The Reagan administration filed its first fair housing case on February 4, 1982, and brought only one other Title VIII case in Fiscal Year 1982.[107] At one point during this time, the Justice Department's fair housing caseload fell to a total of twelve active cases.[108]

Five new cases were filed in Fiscal Year 1983. Then, a substantial increase in new case filings occurred, as shown in Table 1.[109]

The increased level of activity in the latter years was partly attributable to organizational changes. During the 1981-1983 period, the Department continued the basic management structure initiated by the Carter administration of assigning fair housing cases to the Civil Rights Division's General Litigation Section. One change made during this time, however,was that the responsibility for handling "traditional" fair housing cases was taken back from local U.S. Attorneys.[110]

In October of 1983, the General Litigation Section was disbanded and was replaced by two new sections called the "Educational Opportunities Section" and the "Housing and Civil Enforcement Section."[111] The purpose of this reorganization was to allow the new Sections to better concentrate their efforts on the subjects assigned to them. The Housing and Civil Enforcement Section was given the responsibility of enforcing Title VIII and two other statutes,the Equal Credit Opportunity Act and Title II (public accommodations) of the 1964 Civil Rights Act.

The explanation for the low number of case filings during the 1981-1983 years, according to one senior Justice Department official, is that this was "[a] necessary start-up period . . . during which contacts with local fair-housing groups and sources were re-established."[112] Another possible explanation for the change in activity is that the Justice Department was reacting to the strong criticism of its weak fair housing record contained in two reports published in 1983 by private groups: (1)Citizens' Commission on Civil Rights, *A Decent Home: A Report on the Continuing Failure of the Federal Government to Provide Equal Housing Opportunity* (April 1983); and (2) Washington Council of Lawyers, *Reagan Civil Rights: The First Twenty Months* (1983). In any event, the October 1983 reorganization did coincide with the beginning of a more active time for the Civil Rights Division in fair housing litigation.

The large increase in new case filings in 1984 is somewhat misleading. Many of these cases (seven out of seventeen) involved similar allegations of illegal steering by seven realtors in one Chicago area, which might have been brought as

Table 1

Fiscal Year	New Fair Housing Act Cases Filed by the Justice Department Under the Reagan Administration
1981	0
1982	2
1983	5
1984	17
1985	18
1986	12
1987	17
7-year total:	71 (average: 10 per year)

a single "group" pattern or practice case.[113] Even discounting these cases,however, the number of new cases filed in 1984 was substantially above those in previous years, and this approximate level of activity continued for the remainder of the Reagan administration.

Overall, the statistics for the seven-year period show an average of ten new fair housing cases per year. If only the 1984-1987 period is considered, the yearly average is sixteen. These yearly averages amount, respectively, to 31 and 50 percent of the thirty-two cases per year that Justice filed in the 1969-1978 period.

One measure of an administration's commitment to vigorous enforcement of the Fair Housing Act is the number of new cases it brings. By this measure, the Civil Rights Division under the Reagan administration was substantially less committed to challenging housing discrimination than were its predecessors.

Of course, raw statistics do not paint a total picture of an administration's record. The nature of the cases prosecuted, the relief obtained, and the policies pursued must also be examined. This is done in the following sections.

2. *Types of Cases Filed and Policies Pursued*

The Title VIII cases filed by the Justice Department during the Reagan administration reflect a good deal of variety. The types of cases most frequently pursued were claims of racial steering against realtors and racial discrimination claims against apartment complexes, rental agencies, and time-share developers.[114] Other cases involved restrictive covenants, trailer parks, and local governments accused of discrimination in municipal services, public housing, and other activities.[115] Most of the cases were based on racial discrimination, but a few alleged national-origin discrimination, and at least one each involved discrimination against women and American Indians.[116] In addition, the Department prosecuted a number of criminal cases involving the use of force or violence against people exercising their fair housing rights. (These criminal cases are discussed in Part II-C-5 *infra*.)

One type of case is noticeably absent from this list. Not a single exclusionary land use case was filed by the Justice Department during the Reagan administration. The avoidance of this particular type of case was not simply a matter of chance. The Reagan Justice Department chose as a matter of policy to de-emphasize claims of this nature.

In part, this decision was dictated by another major policy change from previous administrations. Early in the Reagan administration, the Civil Rights Division adopted a new policy of refusing to rely on the discriminatory effect theory in housing cases.[117] The determination to pursue only discriminatory intent cases was not prompted by any new judicial decision. Indeed, all of the appellate decisions on this issue during the 1980s endorsed the view that the Fair Housing Act included a discriminatory effect standard. (These decisions are reviewed in the next section.) Despite these decisions, the Justice Department throughout the Reagan administration maintained its policy of not prosecuting housing cases based on the discriminatory effect theory.

This policy had a particularly devastating impact on exclusionary land use cases. These cases often must rely on the discriminatory effect theory, because of the difficulty of proving discriminatory intent on the part of a zoning board, town council, or other group of public officials.[118] Indeed, the principal use of the discriminatory effect theory in the fair housing field has been in land use cases.[119] When the Civil Rights Division chose to abandon the effect theory, it severely limited its ability to challenge discriminatory land use decisions. As noted above, no new cases of this type were filed after 1980, and the cases inherited from the Carter administration had to be pursued "with one hand tied behind the back."

Some of these inherited cases against municipalities were settled. At least one was tried and lost because of insufficient proof of the defendants' discriminatory intent.[120] Two others (*Birmingham* and *Yonkers*) were won because the evidence of discriminatory intent was so overwhelming.[121] These intent-based victories, however, were of no real precedential value.[122] Eventually, exclusionary land use cases all but passed from the scene as an active part of the Justice Department's fair housing caseload. The only exception is the case against Yonkers, New York, where the defendants' contemptuous refusal to obey a remedial order has prolonged the case and turned it into a major national news story. The irony of *Yonkers* is that an exclusionary zoning case filed during the Carter administration may turn out to be the most famous example of vigorous fair housing enforcement by the Reagan administration.

Apart from *Yonkers*, the nature of the fair housing cases prosecuted by the Reagan administration shows an almost total reversal from the path pursued in the late Carter administration. The focus on exclusionary land use cases was abandoned, and the variety that had characterized the 1969-1978 period was re-established.

Well-intentioned people may differ over whether a focused or a varied approach will best allow the Justice Department to use its limited resources and legal authority to enforce the Fair Housing Act. Each approach has certain advantages and disadvantages, and each may be appropriate for the needs of a particular time.

The potential benefits of a varied approach, however, were severely undermined by other policies pursued during the Reagan administration. The principal advantages of a varied caseload are that it may deter a wider range of would-be violators, and it allows the Justice Department to assume a leadership role in the development of fair housing law on a number of different fronts. In order for these potential benefits to be realized, however, the Department must be prepared to prosecute a significant number of cases through the trial and appellate levels. The record of the Reagan Justice Department shows that it was unwilling to do this. As already noted, the level of new case filings was cut substantially in the 1980s. In addition, the Civil Rights Division demonstrated a strong aversion to taking fair housing cases to trial. Settlement was the preferred policy. In almost every year of the Reagan administration, the number of fair housing cases resolved by consent decrees exceeded the number of new cases filed.[123] Many cases were "pre-settled," with the proposed consent decree being filed simultaneously with the complaint.[124] In its annual reports, the Civil Rights Division regularly proclaimed its policy of increased "consultation, negotiation, conciliation, and mediation of issues to aid in diminishing the civil litigation workload of the federal judiciary."[125]

Settling a given case, of course, may well be appropriate, particularly if the relief obtained in a consent decree is substantially as great as could be hoped for from litigation. There is no evidence, however, that the Department achieved any special forms of relief in these cases.[126]

Apart from the specifics of individual cases, it is clear that the Civil Rights Division's heavy emphasis on settlement of fair housing cases was a misguided policy. As an initial matter, it should be obvious that the workload problems of the federal judiciary are not materially affected by the handful of fair housing cases brought by the Justice Department, and this factor should not have been a relevant consideration in deciding whether to settle these cases. More importantly, the pro-settlement policy, when combined with fewer case filings, meant that the Civil Rights Division rarely tried a fair housing case during the Reagan administration. In 1987, for example, a grand total of two fair housing cases were tried and won by the Justice Department.[127]

By choosing to file fewer cases and to try almost none, the Civil Rights Division guaranteed that the major potential benefits of a varied caseload--greater deterrence and a leadership role in legal developments--could not be realized. Instead, the Reagan administration chose to emphasize the fact that its cases resulted in thousands of housing units being made available on a nondiscriminatory basis.[128] This is a legitimate achievement, but not a strategically important one. The number of units involved in Justice Department cases can never be more than a tiny fraction of the total housing in the United States. Therefore, in order for the Justice Department to make a significant contribution to fair housing enforcement, its role must be a *public* one. This cannot be accomplished by refusing to try cases.

As the number of litigated fair housing cases declined during the Reagan administration, so too did the opportunity for the Justice Department to play a major role in the development of Title VIII law. At the trial court level, the Civil Rights Division's aversion to litigation allowed defendants to exercise a disproportionate role in choosing which cases would be settled and which would go to trial, thereby determining what the judicial agenda would be. At the appellate level, Justice Department cases produced only four new reported decisions after 1980, and three of these resulted from cases filed during the Carter administration.[129] In addition, the Department curbed its prior practice of filing *amicus* briefs in important private fair housing cases.[130] The net result of these policies was that the Justice Department virtually abandoned its historic role as a leading force in the development of fair housing law.

Overall, the impact of the fair housing cases prosecuted by the Reagan Justice Department has been minimal and haphazard. However, two important and consistent doctrinal themes do emerge from the Department's handling of Title VIII cases during this time: (1) abandonment of the discriminatory effect theory; and (2) hostility toward race-conscious programs designed to foster integration. These two positions are discussed in the next two sections.

3. Abandonment of the Discriminatory Effect Theory

As noted above, the Civil Rights Division early in the Reagan administration adopted a new policy of refusing to rely on the discriminatory effect theory in Title VIII cases.[131] This meant that the Justice Department would pursue only those fair housing cases based on proof of the defendant's discriminatory intent. This policy change was not prompted by any new judicial decision. Indeed, the appellate decisions on this issue, both before and during the 1980s, have generally held that the Fair Housing Act does include a discriminatory effect standard.[132] Nevertheless, the Justice Department maintained its policy of not pursuing discriminatory effect cases throughout the Reagan administration. In addition, the Department has opposed the discriminatory effect theory as *amicus curiae* in privately-initiated cases.[133]

The issue of whether the Fair Housing Act bans only intentional discrimination or whether it also covers practices that produce discriminatory effects has not yet been decided by the Supreme Court.[134] The language of the statute does not clearly resolve this question nor does the legislative history provide a definitive answer. In these circumstances, the principal sources of authority are Supreme Court decisions in analogous civil rights areas and Title VIII decisions of the federal courts of appeals, both of which strongly support the view that Title VIII applies to discriminatory effect cases.

With respect to the statutory language, Title VIII prohibits, with certain limited exceptions, virtually every housing practice that discriminates "because of," "based on," or "on account of" race, color, religion, sex, or national origin.[135] The Act does not specify whether these phrases cover only intentional discrimination or whether they apply as well to practices with discriminatory effects.

This statutory language is similar to the wording used in Title VII of the Civil Rights Act of 1964, which the Supreme Court held in *Griggs v. Duke Power Co.*[136] includes a discriminatory effect standard. The plaintiffs in *Griggs* based their claim on Section 703(a) of Title VII, which makes it unlawful for an employer to discriminate against any individual "because of such individual's race." The Supreme Court did not specifically discuss the meaning of this phrase nor its legislative history. Rather, the opinion focused on the broad purposes underlying Title VII, concluding that the statute was intended "to achieve equality of employment opportunities and remove barriers that have operated in the past" to hurt minority employees.[137]

Griggs is a powerful precedent in favor of a discriminatory effect standard for the Fair Housing Act. The decision unanimously interpreted a civil rights statute that was passed only four years before Title VIII and that used almost the identical "because of race" language as Title VIII. Furthermore, the same type of broad remedial objectives that were held to underlie Title VII also prompted the passage of the Fair Housing Act.

The legislative history of the Fair Housing Act does not include any specific discussion of the "intent vs. effect" issue,[138] but it does include a good deal of evidence concerning the broad impact that Congress intended the new law to have. Proponents of the statute in both the House and Senate spoke repeatedly of their desire to achieve the *result* of an integrated society through this legislation.[139] Title VIII begins with the sweeping declaration that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[140] Certainly, it is "within constitutional

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limitations" to outlaw practices with discriminatory effects. Indeed, Senator Mondale, the principal sponsor of Title VIII, in commenting on the role that government had played in maintaining segregated housing conditions, concluded that: "It thus seems only fair, and is constitutional, that Congress should now pass a fair housing act to undo the effects of these past state and federal unconstitutionally discriminatory actions."[141]

The broad scope envisioned for Title VIII by its proponents has been recognized by the Supreme Court. One year after *Griggs*, the Court decided its first Fair Housing Act case, *Trafficante v. Metropolitan Life Insurance Co.*,[142] which held that the statute reflects "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." The Court's unanimous opinion commented that the language of the Fair Housing Act is "broad and inclusive," that the Act carries out a national "policy that Congress considered to be of the highest priority," and that vitality can be given to this policy "only by a generous construction" of the statute.[143] This mandate by a unanimous Supreme Court to construe Title VIII broadly has become the foundation for all subsequent judicial interpretation of the Fair Housing Act. It is similar to the broad view of Title VII that the *Griggs* Court relied on to interpret that statute to include a discriminatory effect standard.

When the Reagan administration took office in 1981, about half of the circuit courts of appeals had addressed the discriminatory effect issue in a Title VIII case. A clear majority of these courts endorsed the discriminatory effect theory. These included the Third Circuit in *Resident Advisory Board v. Rizzo*,[144] the Fifth Circuit in *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*,[145] the Seventh Circuit in the *Arlington Heights* case,[146] and the Eighth Circuit, at the prompting of the Justice Department, in *United States v. City of Black Jack*.[147] On the other hand, the Sixth Circuit in the *Skillken* case seemed to equate the proper Title VIII standard with the purposeful discrimination standard that governs Equal Protection claims.[148] The Second Circuit produced mixed results, holding in *Boyd v. Lefrak Organization*[149] that the *Griggs* standard was "inapposite" in Title VIII cases, and then indicating in *Robinson v. 12 Lofts Realty, Inc.*[150] that it did subscribe to the discriminatory effect theory.

During the 1980s, the number of circuits favoring the discriminatory effect standard grew steadily. The Fourth Circuit in *Smith v. Town of Clarkton*[151] and *Betsey v. Turtle Creek Associates*[152] and the Ninth Circuit in *Halet v. Wend Investment Co.*[153] aligned themselves with this view. The new Eleventh Circuit announced a policy of following the precedents of the old Fifth Circuit,[154] thereby putting itself in the pro-effect group. In addition, the two circuits that had shown some reluctance about the effect theory during the 1970s moved toward adopting this approach. The Sixth Circuit in *United States v. City of Parma, Ohio*[155] announced that *Skillken* had not been a dispositive interpretation of Title VIII and then embraced the discriminatory effect theory in *Arthur v. City of Toledo, Ohio*.[156] The Second Circuit stated in *United States v. Starrett City Associates*[157] that Title VIII's coverage extends to practices that "disproportionately affect minorities," and then in *Huntington Branch, NAACP v. Town of Huntington*,[158] the same court produced a powerful endorsement of the effect theory for cases against public defendants, concluding that *Boyd's* precedential value was "a matter of considerable uncertainty."

By mid-1988, therefore, a strong consensus had developed among the circuits that the proper meaning of Title VIII included a discriminatory effect standard. Only the First, Tenth, and D.C. Circuits have not been heard from on this issue. Not a single court of appeals currently espouses the view that the effect theory is inappropriate for Title VIII cases.

It should be noted that there are, in fact, two different types of discriminatory effect cases under Title VIII. Historically, the more common type has involved exclusionary zoning or some other communitywide practice that is challenged on the ground that it perpetuates housing segregation in an entire area. Most of the appellate decisions reviewed above are of this variety. The other type of effect case challenges a housing practice because it has a greater adverse impact on minorities than on whites. This "disproportionate impact" type of discriminatory effect case has been well known in the employment discrimination field ever since *Griggs*, but it has been less common in Title VIII cases. An example of this type of effect case in the housing field is *Betsey v. Turtle Creek Associates*.[159] Some cases, like *Huntington*, use both approaches.[160]

The Justice Department's refusal to prosecute discriminatory effect cases during the Reagan administration has had a number of unfortunate consequences. First, it meant that the Department abandoned its historic role as an advocate for a broad interpretation of Title VIII. The development of the law was left to privately-initiated cases in which the Civil Rights Division did not even participate as *amicus curiae.*[161]

Second, as noted above, the Justice Department's decision to forsake the discriminatory effect theory had a particularly devastating impact on the exclusionary zoning cases that had been inherited from the Carter administration. In the twenty-year history of Title VIII, the effect theory has been mainly used in certain types of large cases involving systematic or communitywide discrimination. These cases, which can be vitally important in attacking large patterns of segregated housing, were the primary casualty of the Justice Department's refusal to use the discriminatory effect theory.

Finally, as judicial acceptance of the discriminatory effect theory grew during the 1980s, the fact that Justice Department policy failed to change in response to these new decisions became less and less defensible. To the extent that this policy was allegedly based on a neutral, nonpartisan interpretation of Title VIII, then the Civil Rights Division appeared less and less competent at the simple task of understanding the law. It is hard to imagine a more devastating criticism of the Justice Department than that it cannot seem to learn the meaning of a statute that it is empowered to enforce. The other possible explanation for the Civil Rights Division's intransigence is that it knew perfectly well what Title VIII meant, but it chose not to act on that knowledge. If this is true, then the Department's refusal to prosecute discriminatory effect cases was tantamount to a unilateral declaration that certain types of Fair Housing Act violations would simply be ignored. This arbitrary decision to abandon part of its enforcement duties was never explained or justified in public, which made it seem even more irresponsible. The Reagan Justice Department's handling of the discriminatory effect issue in Title VIII matters tarnished its reputation as an partial enforcer of the law.

4. Hostility Toward Race-Conscious Programs Designed to Foster Integration

One of the hallmarks of the Justice Department's civil rights record during the Reagan administration has been its hostility to "affirmative action" generally and in particular its policy of "declining to seek quota relief in employment discrimination cases."[162] This philosophical opposition to race-conscious methods of fostering integration carried over to the housing field as well. Unlike the employment field, however, housing has very few examples of traditional "affirmative action" programs (that is, race- and sex-conscious programs designed to expand opportunities for minorities and women). It is almost unheard of, for example, for a private housing supplier to set aside a particular percentage of its units that will be made especially available to minorities because of their race.[163] Nevertheless, the Justice Department's philosophical hostility toward race-conscious remedies was able to manifest itself in housing cases in at least three ways: limited relief; curbing integration efforts by public housing authorities; and opposing private rental quotas.

a. Limited Relief

First, the Department followed the same policy of eschewing classwide relief in housing cases that it did in employment cases. Since most of its housing cases were resolved by settlements (see Part II-C-2 *supra*), this policy was most often manifested in the fact that the Department's housing consent decrees did not require defendants to adopt pro-integration remedies. The most famous example of this policy was the *Gersten* litigation.[164]

In 1983, private plaintiffs and the Justice Department filed separate suits against the Gersten Companies, a large apartment management firm in California that was accused of discriminating against blacks and other minorities in violation of Title VIII. Within a year, the Department settled its suit in a consent decree that prohibited future violations and provided preferential treatment to one hundred identified victims of the defendants' discrimination.[165] The private suit on behalf of a class of black apartment applicants continued. Later, a plan to settle this suit was proposed that included requiring Gersten to fill vacant units with a certain percentage of blacks for a limited period of time. This percentage was based on the rate of qualified blacks in the local applicant pool. The Justice Department opposed this plan because nonblack minorities were not included and also because of the Department's opposition to race-conscious remedies.[166]

In a 1987 decision, the Ninth Circuit held that the private plan was not improper generally, but that the rights of nonblack minorities should have been considered by the district court before the plan was approved.[167] The case was remanded with orders that the remedial plan be modified to "provide relief to all identifiable discriminatee classes commensurate with the injury borne by each class."[168]

b. Curbing Integration Efforts by Public Housing Authorities

Another way that the Reagan Justice Department manifested its hostility to race-conscious remedies was by suing local public housing authorities that used race-conscious tenant assignment plans to integrate their units. For example, in a suit that is still pending, the Department accused the Charlottesville (Va.) Redevelopment and Housing Authority of violating Title VIII by favoring white applicants for an all-black project.[169] The Charlottesville plan admittedly used race as a factor in tenant selection, but only as a last resort to reverse a long history of segregated public housing and only until a certain level of integration was achieved. These factors had led the Department of Housing and Urban Development to approve the Charlottesville plan in the early 1980s as a proper means of meeting that city's affirmative duty to integrate its units.

The Justice Department's hostility to pro-integration assignment plans effectively reversed HUD's earlier approval of such plans, not only in Charlottesville but throughout the country. In Kentucky, for example, a total of nineteen local public housing authorities had adopted race-conscious plans to help integrate their previously segregated projects in the late 1970s and early 1980s.[170] All of these plans had been reviewed and approved by HUD. One of them, Owensboro, actually resulted from a Title VIII consent decree secured by the Justice Department in 1980.[171] Experience under these plans showed that the PHAs that used them were achieving integration much more effectively than were other Kentucky housing authorities that operated without such plans.[172] Nevertheless, in 1987, presumably at the urging of the Reagan Justice Department, HUD reversed its approval of sixteen of these Kentucky plans and, by threatening to cut off funds to these authorities, forced them to abandon their race-conscious integration plans.[173]

The impact of this new policy on housing desegregation efforts nationwide is potentially devastating. It applies to tens of thousands of housing units owned by public agencies which have finally determined that some degree of race-consciousness in their assignment plans is necessary to end long-established patterns of segregation in public housing. This is not to say that every one of these plans is appropriate or that some additional fine-tuning to guarantee individual rights is not called for.[174] However, for the federal government to oppose these race-conscious plans as a general philosophical matter is indefensible. Obviously, they are remedial in nature, and Supreme Court decisions in analogous situations clearly authorize limited race-conscious efforts by local government agencies to remedy past segregation.[175]

There is a terrible irony to the Justice Department's opposition to such plans, as the *Owensboro* case demonstrates. For years after passage of the Fair Housing Act, the federal government tried to encourage local housing authorities to integrate their segregated public housing systems. Now, when some local PHAs--many of them in the South--have finally decided to take modest, voluntary steps toward integration, the federal government is attempting to use Title VIII to reverse those efforts.

c. Opposing Private Rental Quotas

The third way that the Justice Department has opposed pro-integration programs in the housing field is by filing two suits against large apartment complexes that use racial quotas to foster and maintain integration.[176] Both of these complexes--Atrium Village in Chicago and Starrett City in New York--are private, federally-subsidized developments located between minority and white areas, and both, with HUD approval, imposed percentage limits on minority tenants as a way of maintaining a stable, integrated community. This use of pro-integration racial quotas is extremely rare among private housing developers. Indeed, Atrium Village and Starrett City are among the few examples of this phenomenon in the entire nation. Thus, in terms of the number of units affected, these cases have a much smaller impact than cases like *Charlottesville* involving public housing authorities.

The case against Starrett City, however, has become extremely important as a precedent. (The *Atrium Village* case is still in the pre-trial stage.) The issue in *Starrett City* goes to the very heart of what the Fair Housing Act means, and in particular, the degree to which Title VIII permits race-conscious methods of achieving integration. In addition, the importance of *Starrett City* to the Reagan administration is reflected in the fact that it is one of the few Title VIII cases tried by the Civil Rights Division in the 1980s and the only case filed by the Reagan Justice Department that has resulted in a reported appellate decision. Therefore, a rather detailed analysis of this case is presented here.

d. Starrett City: Background and Trial Court Ruling[177]

Starrett City is the largest housing development in the United States. Its forty six high-rise buildings contain over 5,800 apartments and house 17,000 residents. The development was built in a racially-mixed area of Brooklyn, New York, in the 1970s by private owners using government subsidies. In order to maintain the complex as an interracial community, the owners established a tenant-selection system that limited blacks to 22 percent of the tenants in each apartment size in each building. Hispanics were limited to 8 percent. Some 64 percent of the units were reserved for whites, with the remaining 6 percent set aside for Orientals and other groups.

Far more blacks and Hispanics applied than could be accommodated under these assigned quotas. Starrett City adhered to its racial goals by keeping separate waiting lists for each race and by passing over minority applicants when these goals dictated that a unit be filled by a white family. As a result, blacks and Hispanics received fewer units than they would have without the racial limitations, and the waiting period for qualified minorities was much longer than it was for whites.

In 1979, several blacks who had been denied apartments at Starrett City filed a class action based on Title VIII and other laws.[178] Five years later, the parties in this case agreed to a proposed settlement that called for a higher percentage of Starrett City units to be rented to minorities. The Reagan Justice Department then filed its own suit against Starrett City and intervened in the private case to oppose court approval of the proposed settlement, alleging that both the original quotas and the settlement-enhanced quotas violated Title VIII.

The Justice Department argued that Starrett City's quota system limited minority housing opportunities in a number of ways that violated the Fair Housing Act. The defendants conceded that their rental policies fell within the literal language of the statute's ban on discriminatory housing practices. By way of defense, they argued that Title VIII's real goal was integration and that integration could be maintained at Starrett City only by keeping the percentage of minorities below a certain critical "tipping point" in order to prevent "white flight." This position was supported by three expert witnesses, all of whom endorsed the "tipping" theory and the need for racial controls to promote long-term integration, although they could not agree on the precise point at which a community like Starrett City would "tip."

The trial court rejected Starrett City's pro-integration defense.[179] Judge Neaher ruled that the defendants' "treatment of blacks and other minority persons constituted a clear violation of the Fair Housing Act."[180] He felt that the plain meaning of the Act, as revealed by its language and the concerns of its principal sponsors, was to prohibit racial discrimination. Integration--though mentioned by Senator Mondale in the legislative history and referred to in subsequent Supreme Court decisions[181]--was simply a "gloss placed upon the Act" and could not be used to justify a denial of equal treatment to minorities.[182]

Judge Neaher's opinion drew a distinction between private and governmental defendants in terms of their ability to use the "tipping" phenomenon to justify racial quotas. Starrett City had argued that its policies were protected by *Otero v. N.Y.C. Housing Authority*,[183] a 1973 decision by the Second Circuit which held that a public housing authority could favor whites over blacks in order to achieve integration in a new development. According to Judge Neaher, however, *Otero* extended only to government housing, whereas here "[t]he defendants, as private landlords, are not clothed with governmental authority. Their obligation is simply and solely to comply with the Fair Housing Act."[184]

e. *Starrett City* in the Second Circuit: Majority and Dissenting Opinions[185]

In a 2-to-1 decision, the Second Circuit affirmed, but for somewhat different reasons. Judge Miner's majority opinion saw no particular significance in the distinction between public and private defendants. "Even if Starrett were a state actor," he wrote, "the racial quotas and related practices employed at Starrett City to maintain integration violate the anti-discrimination provisions of the Act."[186]

According to Judge Miner, the proper basis for distinguishing *Otero* was not the public nature of the defendant there, but rather the fact that the pro-integration program in *Otero* covered only a single event--the initial rent-up of an apartment complex--whereas Starrett City's program involved long-term integration maintenance. The limited duration of the *Otero* program was the key to its legality.[187] The duration of a pro-integration housing program is significant, according to the Second Circuit, because duration has been a critical factor in other types of affirmative action decisions. Judge Miner resorted to these "analogous" decisions, because he found that the legislative history of the Fair Housing Act could not resolve the *Starrett City* issue. The Congress that enacted Title VIII sought both to eliminate housing discrimination against minorities and to achieve residential integration. Congress assumed that nondiscrimination would lead to integration, and it did not consider situations like Starrett City where the goal of integration might conflict with the goal of nondiscrimination.[188]

Finding no guidance from Title VIII's legislative history, Judge Miner turned to the Supreme Court's affirmative action decisions in the employment discrimination field. His analysis of these decisions led him to conclude that a race-conscious plan for achieving integration might be acceptable if it were "temporary in nature with a defined goal as its termination point."[189] Two other relevant factors would be: (1) whether the plan is designed to remedy some prior racial discrimination or imbalance within the entity employing it; and (2) whether the plan seeks to increase minority participation ("access quotas") as opposed to limiting minority opportunities ("ceiling quotas").[190]

The Second Circuit held that Starrett City's quotas failed to satisfy all three of these criteria. First, the duration of the program was too long: it had already been in effect for ten years, and there was no end in sight. Second, Starrett City's quotas were used from the very beginning of the development, not as a remedy for past discrimination. Finally, the quotas put a "ceiling" on minority residents at Starrett City, thereby burdening those "for whom Title VIII was intended to open up housing opportunities."[191]

The *Starrett City* opinion made clear that its holding was a narrow one. According to the Second Circuit, not all race-conscious methods of promoting integrated housing are barred by Title VIII, but the statute does not allow "rigid racial quotas of indefinite duration to maintain a fixed level of integration at Starrett City by restricting minority access."[192]

In his dissent, Judge Newman argued that the Fair Housing Act was never intended to ban integration maintenance programs. He pointed out that the statute was designed to end residential segregation, and that the Act's chief sponsor, Senator Mondale, had spoken of replacing the ghettos "by truly integrated and balanced living patterns."[193] Judge Newman agreed with the majority that Congress did not specifically consider the legality of a plan like Starrett City's, but he concluded that "[h]ad they thought of such an eventuality, there is not the slightest reason to believe that they would have raised their legislative hands against it."[194] He found the majority's effort to distinguish *Otero* unpersuasive, noting that neither the text nor the legislative history of Title VIII makes a distinction between limited-duration and long-run plans.

In Judge Newman's view, Starrett City's evidence concerning the need for quotas to prevent racial segregation at its complex was "solidly based." He quoted Dr. Kenneth Clark, one of Starrett City's expert witnesses, to the effect that it would be "a tragedy of the highest magnitude if this litigation were to lead to the destruction of one of the model integrated communities in the United States." The dissent concluded that "the

Fair Housing Act does not require this tragedy to occur."[195]

The dissent also criticized the role of the federal government in the *Starrett City* litigation. Judge Newman noted that the defendants' integration maintenance policies had "at all times occurred with the knowledge, encouragement, and financial support" of the Department of Housing and Urban Development.[196] The minority applicants who claimed to be harmed by these policies spent five years litigating their private suit without any help from the federal government. Only after these private efforts had produced a settlement acceptable to the class of minority applicants did the Justice Department decide to sally forth and challenge the Starrett City quotas. This bizarre record, according to Judge Newman, "raises a substantial question as to the Government's commitment to integrated housing."[197]

f. *Starrett City* Analyzed

The fact that the Justice Department's decision to sue Starrett City may have been based more on its philosophical hostility to pro-integration plans than any deeply-felt concern for minority rights does not mean that its legal position is incorrect. Indeed, that position has been vindicated, to a certain degree, by the Second Circuit's decision. This decision is not likely to be the last word on the matter--the Starrett City defendants have petitioned for *certiorari* in the Supreme Court,[198] and other courts are currently struggling with similar issues[199]--but there are good reasons to believe that *Starrett City*-type quotas do violate the Fair Housing Act.

It is true, as Judge Newman's dissent pointed out, that the proponents of Title VIII hoped that the statute would lead to integrated housing patterns. There can be no dispute on this point. The sponsors of the Fair Housing Act clearly wanted people of different races to live next to one another, so that the fears, hostility, and stereotyping bred by racial separation could be reduced.[200] Integration was not merely a "gloss placed upon the Act," as the *Starrett City* trial judge had concluded. It was a major goal, an end in itself. The sponsors of Title VIII would have approved of the *result* achieved at Starrett City.

But would they have approved of the *means* used to achieve that result? That is the real question raised by Starrett City's racial quotas. The legislative history of Title VIII gives the overwhelming impression that the Act was intended to strike down all racially-based techniques for limiting the housing choices of minorities. Time and time again, the proponents of Title VIII expressed their hostility to discrimination that limited blacks' opportunities to choose where to live. It is unlikely, therefore, that the Congress of 1968 intended to permit the use of minority-limiting quotas under any circumstances, even where those quotas were adopted to achieve the "benign" goal of integration.

For this reason, the majority opinion in *Starrett City* may actually be too generous to the type of "ceiling quotas" involved there. The multifactor approach adopted by the Second Circuit was based on Supreme Court decisions in affirmative action cases that were *not* analogous to Starrett City's quotas. Those decisions indicate that pro-integration employment plans designed to *expand* minority opportunities may be upheld in certain circumstances.[201] But, race-conscious plans that *limit* minority opportunities have never been approved by the Supreme Court. Thus, the suggestion in *Starrett City* that a minority-limiting quota might be upheld if it were "temporary in nature" is not supported by the case law.

The only precedent for curbing minority opportunities in order to achieve housing integration is *Otero*. That case is distinguishable from *Starrett City*, but not for the reason given in the Second Circuit opinion (that is, because of the limited duration of the *Otero* program). *Otero* was based on the assumption that the defendant there was "under an obligation to act affirmatively to achieve integration in housing."[202] The source of this duty was a special provision in Title VIII--Section 808--that requires HUD and HUD-funded housing authorities to act "affirmatively" to further fair housing.[203] There is a great deal of debate about the meaning of this provision, but one thing is clear: it does not apply to private housing suppliers. The private defendants in *Starrett City* simply were not under the same kind of obligation to integrate their units as the *Otero* defendants were perceived to be. Thus, the one case that appeared to contain some justification for *Starrett City's* use of minority-limiting quotas was not on point.

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Finding a legitimate ground for distinguishing *Otero* helps to reinforce the belief that the Second Circuit was probably correct in holding that Starrett City violated the Fair Housing Act. The majority opinion may be flawed in many respects, but its basic conclusion that Starrett City's quotas are unlawful is certainly defensible.

g. Critique of the Justice Department's Approach to Race-Conscious Programs

Thus far, the Justice Department's legal position in the *Starrett City* case has been upheld by the trial court and a divided panel of the Second Circuit. Unlike its position on the discriminatory effect issue, therefore, the Department's legal position cannot be said to be clearly "wrong." Still, the Civil Rights Division's role in attacking the Starrett City quotas and its general hostility to race-conscious programs designed to foster integration are subject to a number of legitimate criticisms.

First, as Judge Newman's dissent pointed out, the Justice Department's tardy entrance into the *Starrett City* litigation raises questions about the Reagan administration's support for the concept of integrated housing. This inability to appreciate the importance of integration in a Title VIII case has legal, as well as policy, implications.

As pointed out above, the legislative history of the Fair Housing Act makes clear that integration is a major goal of this law, separate and independent of the goal of expanding minority housing opportunities. In this respect, Title VIII differs from, say, Title VII, which was intended to expand minority employment opportunities, and thus may lead to an integrated work place, but which does not place a strong value on integration per se. By way of contrast, the proponents of Title VIII considered housing integration to be an important goal that would benefit not only minorities, but "the whole community."[204]

This added element within the Fair Housing Act can, and should, affect how the law is interpreted. This is why, for example, the courts have held that Title VIII's discriminatory effect standard includes "perpetuation of segregation" cases as well as the "disparate impact" cases that are familiar under Title VII.[205]

The failure of the Reagan Justice Department to understand the value of integration in Title VIII law means that it has underestimated this value generally in race-conscious housing cases. One specific example of this misguided approach is the disasterous attack on pro-integration efforts by local public housing authorities in Charlottesville and elsewhere. Another is that the Department has prosecuted *Starrett City* as if it were just another employment quota case, which may be why the courts in that case have yet to produce a first-rate, insightful analysis of the problem of race-conscious integration programs under Title VIII.

The strong value that the Fair Housing Act places on integration means that *some* race-conscious programs designed to foster integration are legal, even if minority-limiting quotas like Starrett City's are not. These programs can take a variety of forms.[206] For example, the Ohio Housing Finance Agency has adopted a home loan program available only to families who are willing to make "integrative" moves (that is, whites moving into predominantly minority neighborhoods, and blacks moving into white areas).[207] Another example is *Steptoe v. Beverly Area Planning Ass'n*,[208] where a pro-integration housing service that provided information only to homeseekers making racially "nontraditional moves" was held not to have violated Title VIII, because, according to Judge Nordberg, the service had not actually denied housing to anyone. Other cases challenging race-conscious housing information programs designed to promote integration are currently pending in Cleveland and Chicago.[209]

The point is, the legality of pro-integration programs under Title VIII is not a simple matter. The programs are varied, and the precedents from other fields are of limited value. The Justice Department's approach to this complex new area of fair housing law cannot be based simply on a general philosophical opposition to race-conscious programs. To be valid, the Department's position must recognize the special importance of integration in Title VIII law and the difficulties of achieving integration in certain communities without the benefit of at least some forms of race-conscious plans. This understanding has been lacking during the Reagan administration.

A final critique of the Reagan Justice Department in this area is that the decision to prosecute the *Starrett City*, *Atrium Village*, and *Charlottesville* cases amounted to a tragic misuse of the Department's limited fair housing resources. These cases accounted for a major portion of the Title VIII litigation conducted by the Civil Right Division at a time when traditional forms of housing discrimination were continuing to occur on a massive scale. In an era when the federal government estimated that 2,000,000 instances of housing discrimination occurred every year,[210] the Justice Department virtually stopped trying traditional Title VIII cases. Instead, it chose to sue Starrett City after the minority plaintiffs there had secured the relief they wanted. Then, suit was brought against Atrium Village, which may well be the only other private development in the country to use pro-integration quotas. No one would deny that the Justice Department has a legitimate role to play in helping to define the proper meaning of Title VIII in integration maintenance cases. These cases, however, clearly involve special situations that put them outside the mainstream of Title VIII law. For the Reagan Justice Department to have made them the centerpiece of its enforcement program was, at the very least, a tragic misallocation of precious resources.

5. *Criminal Cases*

As in prior administrations, the Reagan Justice Department has assigned the responsibility for prosecuting criminal violations of the 1968 Fair Housing Act to the Civil Rights Division's Criminal Section. This Section also has a variety of nonhousing responsibilities, including matters involving police violence, the Ku Klux Klan, and victimization of migrant workers. Overall, the Criminal Section receives thousands of complaints each year, many of which become the subject of investigations by the FBI.[211]

The 1980s have seen a disturbing number of incidents of racially motivated violence directed against minority families who have moved into white neighborhoods. Criminal activity in violation of the 1968 Act continues to occur and may even be on the rise. This activity is devastating to the goals of the Fair Housing Act. It threatens the lives and property of people who have made an "integrative" move and is clearly intended to intimidate others who may be considering such a move.

In contrast to its record on civil cases (see above), the Reagan Justice Department has been fairly aggressive in prosecuting criminal cases under the Fair Housing Act. Examples include *United States v. Redwine*,[212] where defendants were convicted of firebombing the house of a new black family in a neighborhood in Muncie, Indiana, and *United States v. Stewart*,[213] where four defendants were convicted of similar activities in a Philadelphia neighborhood.

Overall caseload comparisons with prior administrations are difficult to make, because the annual reports of the Criminal Section do not provide separate statistics for its housing cases apart from the rest of its workload. What evidence there is seems to suggest that the Reagan administration fully carried out its criminal prosecution responsibilities in the fair housing area.

However, the Reagan administration certainly could have done much more to discourage this type of criminal behavior. Strong public condemnation of such behavior by national and local leaders is one key to reducing the number of these incidents. President Reagan did make one well-publicized visit to a black family in Maryland who had been victimized by housing violence, but overall, the Reagan administration showed precious little leadership in this area. Indeed, it is arguable that the Reagan administration's image of hostility toward civil rights generally may have contributed to an atmosphere that breeds these tragic incidents.

III. Department of Housing and Urban Development

A. Overview and Organizational Structure

The Department of Housing and Urban Development (HUD) has three major responsibilities under the 1968 Fair Housing Act: (1) to receive and process complaints from persons aggrieved by discriminatory housing practices under Section 810;[214] (2) to conduct certain activities specified in Section 808 and Section 809 in order to carry out its general "responsibility for administering this Act;"[215] and (3) to administer its housing assistance programs and other activities "in a manner affirmatively to further the policies" of Title VIII.[216] This third responsibility supplements HUD's duties under Executive Order 11063, Title VI of the 1964 Civil Rights Act, and other statutes to insure that local public housing authorities and other recipients of HUD funds do not use those funds in a discriminatory manner.[217]

To carry out these responsibilities, Title VIII provides HUD with an additional Assistant Secretary, who is in charge of the Office of Fair Housing and Equal Opportunity (FHEO).[218] Currently, FHEO includes five principal subdivisions: (1) the Office of Enforcement and Compliance, which is responsible for processing Section 810 complaints and certain other matters; (2) the Office of Voluntary Compliance, which encourages realtors and others to take voluntary steps to comply with Title VIII; (3) the Office of Program Standards and Evaluation, which evaluates HUD's fair housing programs and conducts or supervises research studies; (4) the Office of HUD Program Compliance, which is responsible for nondiscrimination in HUD programs; and (5) the Office of Management and Field Coordination, which provides training and administrative and management support for FHEO field offices and evaluates those offices.[219] In addition to FHEO, HUD's Office of General Counsel also has a role to play in fair housing matters, because it is responsible for interpreting statutes, drafting rules and regulations, and otherwise providing legal advice to the Department.[220]

Each of HUD's three basic responsibilities in the fair housing field is reviewed separately in the next three sections. These sections deal primarily with the Reagan administration's record in these three areas. All three of these responsibilities have been amplified somewhat by the 1988 Fair Housing Amendments Act, and each section also notes the relevant changes made by the new law.

B. Enforcement: Private Complaints under Section 810

1. *New Cases Filed*

The number of Section 810 complaints received annually by HUD has fluctuated within a fairly narrow range during the past five years, after a period of substantial growth in the late Carter administration and the early years of the Reagan administration. According to HUD's *Annual Reports*, the yearly figures from 1979 to 1987 are shown in Table 2.[221]

Analyzing HUD's data on cases is difficult, because almost every *Annual Report* presents different information and in a different format. For example, the *1982 Annual Report* sets forth a detailed statistical chart comparing the current year's figures with comparable figures from the previous two years on complaints received and seven other categories dealing with case dispositions.[222] On the other hand, the *1984 Annual Report* contains none of this information.[223] Other reports fall somewhere in between, usually giving the number of complaints received and some, but not complete, information about how these cases were ultimately disposed of. As a group, the HUD *Annual Reports* give the impression that the Reagan administration knows how to present data clearly and thoroughly when it thinks the figures show it in a favorable light (as in 1982), but the presentations become murky and erratic when a period of stagnation sets in. Even the 1982 report, however, is somewhat confusing, because it gives a different figure for the number of complaints received in Fiscal Year 1981 (4,209) than the figure given for that same year in the 1981 report (3,710).[224]

Even these inadequate reports reveal certain basic facts about HUD's caseload during the Reagan administration. First, the growth in Section 810 complaints that characterized the 1979-1982 period clearly stopped in later years, and the level of new case filings never again returned to the 1982 rate. Second, the number of new complaints leveled off at a disappointingly low figure. During the 1980s, HUD estimated that 2,000,000 instances of housing discrimination were occurring every year.[225] A yearly caseload of under 5,000 means that less than one-fourth of one percent of these instances were resulting in a complaint to HUD.

The factors that govern HUD's caseload are not easy to pin down. Unlike Section 813 complaints by the Justice Department, Section 810 complaints must be generated by private persons and organizations, so HUD cannot control its caseload. In addition, the absence of HUD enforcement power under Title VIII meant that Section 810 proceedings had limited appeal to most knowledgeable complainants.[226]

Nevertheless, HUD does bear some responsibility for the reversal in momentum reflected in its caseload statistics during the 1980s. Many state and local fair housing agencies have successfully increased their number of privately-initiated complaints through public information and other outreach programs. HUD's efforts in this area have been minimal. For example, HUD's report in 1984 featured the fact that fair housing poster contests had been sponsored in elementary schools throughout the country.[227] The only innovation mentioned in the next three years was maintenance of a twenty-four-hour toll-free telephone line to accept complaints.[228]

These efforts hardly amount to an effective outreach program that is seriously intended to encourage greater public understanding and use of the HUD complaint process. Now that the 1988 Amendments Act has made that process more attractive, the need for such a program is greater than ever. A serious public information program would not only help to increase the number of private complaints filed with HUD, but it should also lead to greater awareness of situations that might be appropriate for HUD-initiated complaints, which are now authorized by the new law.[229]

Table 2

Fiscal Year	New Section 810 Complaints Received by HUD
1979	2,833
1980	3,036
1981	3,710 [or 4,209]
1982	5,112
1983	4,551
1984	N.A.
1985	4,882
1986	4,157
1987	4,699

These figures show that the number of complaints grew every year from 2,833 in 1979 to a peak of 5,112 in 1982, after which it fell back into the 4,000-5,000 range where it has remained ever since.

2. *Case Dispositions*

a. Referrals to State and Local Agencies

Complaints to HUD under Section 810 must be referred to state and local agencies whose fair housing laws have been determined by HUD to be "substantially equivalent" to Title VIII.[230] One of the hallmarks of HUD enforcement policy under the Reagan administration was to refer as many Section 810 cases as possible to these state and local agencies. To effectuate this policy, HUD certified a record number of states and localities as being "substantially equivalent" during the 1981-1988 period.

In 1980, a total of 38 states and localities had fair housing laws that were considered substantially equivalent to Title VIII.[231] In its first three years, the Reagan administration more than doubled that number, bringing the total to 82.[232] By the summer of 1988, the total number of referral jurisdictions had risen to 112 (36 states and 76 localities), and an additional 18 (1 state and 17 localities) had requests for recognition pending.[233]

This huge increase in the number of referral jurisdictions meant that an ever-growing proportion of HUD's caseload was being handled by state and local agencies. In 1982, HUD reported that the number of Section 810 cases referred to state and local agencies had increased by over 500 percent compared with two years earlier.[234] Over 50 percent of the Section 810 complaints filed with HUD in 1982 were referred to state and local agencies, compared with less than 14 percent in 1980.[235] As this trend continued and as the number of HUD complaints flattened out during the later years of the Reagan administration, the inevitable result was that HUD handled fewer and fewer of its own cases.

For years, state and local referral agencies that received Section 810 cases have been eligible for HUD grants under the Fair Housing Assistance Program. This program was continued during the Reagan administration. The total amount of these FHAP grants grew from approximately $1,400,000 in 1981 to $3,000,000 in 1985, and continued at or near this level in 1986 and 1987.[236]

In theory, there is nothing wrong with HUD certifying and funding a large number of local referral agencies to process its Section 810 complaints. Indeed, Title VIII's mandatory referral system clearly was intended to encourage state and local governments to enact their own fair housing laws and to handle these cases "closer to home." In practice, however, the Reagan administration has too quickly abandoned federal enforcement of Section 810 cases by certifying some state and local agencies who were not, in fact, providing substantially equivalent rights and remedies. A case in point is Virginia, whose fair housing law is administered by the state Real Estate Board and whose lax enforcement procedures have caused local fair housing advocates to challenge HUD's determination of "substantial equivalency."[237]

The 1988 Amendments Act responds to this problem. The new law allows HUD to certify a referral agency only if substantial equivalency exists in four specified areas: (1) substantive rights; (2) procedures; (3) remedies available; and (4) the availability of judicial review.[238] The remedies available, for example, will presumably have to include damages, civil penalties, and other types of relief that will now be available in HUD proceedings.[239] Many of the agencies certified by the Reagan administration will not qualify for continued certification under these standards, unless they greatly strengthen their laws within the forty-month grace period provided for in the new law.[240] Even as to those states and localities whose laws do qualify, the Amendments Act requires HUD to review their certification every five years.[241] Thus, the new law mandates a much more vigorous review process than HUD was conducting under the Reagan administration.

b. Relief in HUD-Processed Cases

Under the 1968 Fair Housing Act, HUD investigates Section 810 complaints that are not referred to state and local agencies and then may try to correct the alleged discriminatory practice "by informal methods of conference, conciliation, and persuasion."[242] In the early years of the Reagan administration, HUD *Annual Reports* included information about the number of Section 810 cases that were successfully conciliated and the relief obtained.

According to the 1982 and 1983 reports, the figures for the 1980-1983 period are found in Table 3.[243]

Table 3 figures show steady, yearly growth in the number of successful conciliations and the number of units obtained, paralleling the growth in the total number of complaints received during this period (see Part III-B-1 *supra*). The growth in monetary relief, however, extends only through 1982 and falls so much in 1983 that it almost returns to the 1980 level.

None of this information is given in the *1984 Annual Report*. Subsequent reports do not include data on the number of successful conciliations or the units obtained, although a figure for the total monetary relief obtained is given ($867,195 in 1985; $797,446 in 1986; and $786,675 in 1987).[244]

Like its reports on new complaints received (see Part III-B-1 *supra*), HUD's reports on the disposition of and relief obtained in Section 810 cases have been erratic and inadequate during the Reagan administration. Even at their best, however, these figures show a pathetically weak national enforcement effort. In 1982, for example, HUD received just over 5,000 complaints, about 2,400 of which were not referred.[245] Successful conciliations totaled less than 1,000, or about 40 percent of the retained cases. Units were obtained in only about one-third of these conciliations. The $698,508 in damages obtained amounted to less than $300 per retained case or about $700 per successful conciliation. In no year did the number of units obtained exceed five hundred. In 1987, the total monetary relief obtained was only marginally above the 1982 figure, despite the fact that damage awards in private fair housing litigation during this period had accelerated dramatically.[246]

To give the Reagan administration its due, this disappointing enforcement record is no worse than the records of prior administrations. Under the 1968 law, HUD simply had no power to force recalcitrant defendants to eliminate discriminatory housing practices or even to enter into serious settlement negotiations.[247]

The principal change wrought by the 1988 Amendments Act is to replace this scheme with one that includes real enforcement powers in the HUD complaint process.[248] The key to the success of this new law will be whether HUD personnel--investigators, conciliators, lawyers, ALJs, and others--will be willing and able to use their new powers aggressively to gain damage awards, civil penalties, and broad injunctive relief for housing discrimination victims who bring their complaints to HUD. To do this, HUD will have to shake off a twenty-year "mind set" of being willing to settle for pathetically inadequate relief, an attitude that was heavily reinforced during the Reagan administration.

C. HUD's General Responsibility for Administering Title VIII

1. *Interpretive Regulations*

HUD's general "responsibility for administering" the 1968 Fair Housing Act includes the authority to issue interpretive regulations concerning the meaning of Title VIII.[249] This rulemaking authority provided a great opportunity for HUD to have a positive impact on fair housing enforcement beyond its case-by-case activities under Section 810. Interpretive regulations would not only have been helpful to HUD staff, potential claimants, the housing industry, referral agencies, and private attorneys, but they also could have greatly influenced future judicial decisions.

For example, in *Griggs v. Duke Power Co.*,[250] the Supreme Court held that Title VII included a discriminatory effect standard in part because that interpretation was consistent with guidelines issued by the Equal Employment Opportunity Commission. According to the unanimous opinion in *Griggs*, "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference."[251] One year later in 1972, this principle was applied in the Court's first Fair Housing Act case, *Trafficante v. Metropolitan Life Insurance Co.*,[252] which concurred in HUD's broad interpretation of standing under Title VIII and noted that HUD's construction of the statute "is entitled to great weight."

Unfortunately, HUD has failed, with minor exceptions, to embrace this opportunity to be an influential interpreter of Title VIII law. Outside of the standing issue in *Trafficante* and a limited set of "Advertising Guidelines for Fair Housing" issued in 1972,[253] HUD has never issued interpretive regulations on the substantive meaning of Title VIII. HUD did publish a comprehensive set of interpretive regulations in the waning days of the Carter administration, but these regulations

Table 3

Fiscal Year	Successful Conciliations	Units Obtained	Monetary Relief
1980	535	250	$448,550
1981	829	310	676,271
1982	946	340	698,508
1983	1,102	441	478,143

were withdrawn by the Reagan administration before they became effective. At that time, HUD officials gave assurances that the regulations would be resubmitted after the Reagan administration had had a chance to review them, but this was never done.[254]

HUD's twenty-year record of inactivity in this area so frustrated the Congress that it included a special provision in the 1988 Amendments Act requiring HUD to "issue rules to implement" the newly-amended Title VIII within 180 days after the enactment of the Amendments Act (*i.e.*, by March 12, 1989).[255] In response to this provision, the Reagan administration, which had shown itself unable to produce satisfactory regulations for over seven and a half years, launched a crash program to complete these regulations before it leaves office. HUD completed the drafting, internal review, and public dissemination steps in this process by mid-October, only a few weeks after President Reagan signed the Amendments Act on September 13, 1988. A noteworthy part of this process was that these regulations were drafted by HUD's Office of General Counsel, with little or no input from the FHEO Office.

This precipitous, eleventh-hour effort to put the Reagan administration's stamp on fair housing law raises serious questions about both the process and the substance of these proposed regulations. One of the first items of fair housing business for the new administration should be to carefully review these regulations and, if necessary, re-write them before the March 12 deadline.

2. *Research and Data Collection*

The 1968 Fair Housing Act specifically directs HUD to "make studies with respect to the nature and extent of discriminatory housing practices" in the United States and to "publish and disseminate reports, recommendations, and information derived from such studies."[256] One of the great disappointments of HUD's performance under the Reagan administration has been the virtual cessation of meaningful research on housing discrimination.

This amounts to a major reversal from the record established by the Carter administration. In 1977, HUD conducted a landmark national study to measure the extent of housing discrimination in forty metropolitan areas of the United States. The basic technique used in this study was to send teams of white and black testers to rental and sales offices to determine if they would be treated equally. The results of this study, which HUD published in 1979, showed that a black homeseeker is likely to encounter at least one instance of discrimination 72 percent of the time in rental situations and 48 percent of the time in sales.[257] HUD also conducted a major national study, published in 1980, on housing discrimination against families with children.[258]

The Reagan administration neither followed up on these studies nor produced any significant fair housing research of its own. Some local studies were conducted during this time by state civil rights agencies and private fair housing groups,[259] but no national leadership was provided. One measure of the dearth of meaningful HUD research during the 1981-1988 period is that when Congress was considering the 1988 Amendments Act, it was forced to rely on the two Carter administration studies cited above as the most recent national surveys of housing discrimination.[260]

As was true in the case of interpretive regulations, Congress's frustration with HUD's dismal record in the area of research resulted in another specific directive to HUD in the 1988 Amendments Act. The new law supplements Title VIII's mandate to HUD to conduct fair housing research by requiring an annual report to Congress "specifying the nature and extent of progress made nationally in eliminating discriminatory housing practices."[261]

In anticipation of this requirement, HUD announced in mid-1988 that it would fund a new national survey on housing discrimination against blacks and Hispanics to be completed in 1990.[262] Once again, therefore, the Reagan administration's inability to generate meaningful fair housing work for seven and a half years has finally given way to an insistent Congress and its own eleventh-hour desire to control the future agenda of such work.

The Amendments Act includes another requirement prompted by HUD's failure over the years to generate information that is important for fair housing enforcement. The new law requires HUD to collect data on the race, sex, national origin, and other characteristics of tenants and other beneficiaries of HUD-assisted housing and to make this data available to the public and to Congress in an annual report.[263] Collection and dissemination of such data is a basic prerequisite for effective enforcement of Title VIII and the other laws that provide for nondiscrimination in public housing. (These laws and HUD's continued funding of segregated public housing are discussed below in Part III-D.) The Reagan administration's lack of interest in this subject is reflected in the fact that for years during the early 1980s, HUD failed to gather this vital information because it could not produce a data-collection form that was acceptable to OMB and its concern for eliminating "unnecessary" paperwork.[264] Congress has now overruled this view that public housing demographic data is not important, and HUD will have to devise appropriate ways to comply with this new mandate.

3. *Voluntary Compliance*

The Fair Housing Act authorizes HUD to "work out programs of voluntary compliance and of enforcement."[265] A special Office of Voluntary Compliance within FHEO is responsible for carrying out this work. Over the years, this Office has negotiated hundreds of written agreements with realtors, developers, and other private elements of the housing industry. The basic purpose of these agreements is to encourage the real estate industry to operate in a nondiscriminatory manner and to endorse the goals of fair housing without the need for litigation or other coercive enforcement tactics. Generally, these agreements call for the signatories to comply with Title VIII, to display fair housing posters in their offices, to participate in educational programs on fair housing law, and to undertake similar activities.

The most famous of these voluntary agreements is the "Affirmative Marketing Agreement" of 1975 between HUD and the National Association of Realtors (NAR).[266] In the late 1970s, this agreement was endorsed by hundreds of local real estate boards and other industry groups in separate voluntary affirmative marketing agreements (VAMAs) executed with HUD.[267] In order to help implement and monitor these VAMAs, HUD established and helped to fund hundreds of local Community Housing Resource Boards (CHRBs), which were made up of HUD-appointed individuals from local governments and private organizations with an interest in fair housing.[268] By 1981, a total of 1,115 VAMAs had been executed with HUD, the number of local CHRBs had reached 589, and HUD's annual funding for CHRBs amounted to $2,000,000.[269]

An emphasis on voluntary compliance was a hallmark of the Reagan administration's fair housing program. From 1981 on, dozens of new VAMAs were executed every year, and the funding for local CHRBs was maintained at or near the $2,000,000 level.[270] Much of this program's potential effectiveness, however, was undermined by two HUD decisions made early in the Reagan administration that set the tone for the entire 1981-1988 period.

First, in 1981, HUD renegotiated its 1975 agreement with the NAR to include a number of new restrictions.[271] For example, CHRB members were not allowed to be parties to Title VIII litigation, which meant that fair housing representatives on local CHRBs had to curb their enforcement activities or resign from the board. CHRBs were also prohibited from sponsoring, conducting, or funding testing programs. In exchange for these restrictions, HUD received virtually no new substantive assurances from the real estate industry. The 1981 agreement with the NAR was renewed in 1985, 1986, and 1987.[272]

Second, HUD adopted a policy of hostility toward real estate testing. In 1982, HUD issued regulations governing CHRB funding that provided, in accordance with the new HUD-NAR agreement, that no HUD funds could be used for testing activities.[273] Ironically, these regulations became effective in the same year that the Supreme Court recognized the value of testing and the standing to sue of fair housing organizations and certain testers in *Havens Realty Corp. v. Coleman*.[274] *Havens* confirmed what fair housing advocates and lower courts had known from the earliest years of Title VIII: that testing is an appropriate and, in most cases, the only effective means of monitoring compliance with the Fair Housing Act.[275] The widespread use of testers in HUD's own national study of housing discrimination in the late 1970s implicitly recognized this fact. Nevertheless, throughout the Reagan administration, HUD aligned itself with the real estate industry in opposition to testing by CHRBs and any other local fair housing group that received HUD funds. (The most important recent manifestation of this policy has been HUD's behavior in connection with the FHIP program, which is discussed in the next section.)

In summary, the Reagan administration's efforts at achieving voluntary compliance were characterized by suspicion and hostility toward fair housing advocates and by a willingness to let leaders of the real estate industry dictate the terms of their own compliance.

The 1988 Amendments Act does not eliminate HUD's authority to seek voluntary compliance, but it does put a much greater emphasis on enforcement through litigation. The success of this new law will require a major change in HUD's attitude toward the role of voluntary compliance as part of an overall program of fair housing enforcement.

4. *The Fair Housing Initiatives Program and Testing*

One of the ways HUD can be most helpful in fighting housing discrimination is to provide funding and leadership for the scores of private organizations and state and local agencies that are engaged in fair housing enforcement. Experience has shown that the existence of an effective local fair housing group is essential to assuring compliance with Title VIII in a particular area. The work of these groups is a major element in any national program of fair housing enforcement.

Over the years, HUD has provided some funding for state and local "referral" agencies and certain CHRBs and other private groups.[276] Last year, as part of the Housing and Community Development Act of 1987,[277] Congress authorized a major new program for funding local fair housing efforts called the Fair Housing Initiatives Program (FHIP). This law provides $5,000,000 in each of the next two years for HUD grants to private and public fair housing agencies.[278] The FHIP program has great potential for increasing fair housing activities nationwide, but that potential is currently threatened as a result of the Reagan administration's opposition to testing.

When the FHIP program was being considered by the 99th Congress in 1986, HUD reached an agreement with the National Association of Realtors that grant recipients could not engage in certain testing activities.[279] These HUD-NAR "testing guidelines," which were written into the proposed legislation, included a number of restrictions. For example, they banned all "systematic" testing by requiring that testing could occur only after a "bona fide allegation" was made, and they required that tests focus on an individual agent as opposed to an entire office. In addition, they forbade testers and fair housing organizations from conducting tests in which they have an "economic interest." This latter restriction was presumably intended to prevent testers and organizations from becoming plaintiffs in cases that grow out of their own testing activities, even though the Supreme Court had specifically approved of this practice in the *Havens* case.[280]

The HUD-NAR agreement on testing restrictions prompted an angry reaction from fair housing advocates. They labeled the agreement a "sell-out" by HUD to the real estate industry, and they argued to Congress that the restrictions would "gut" effective fair housing testing.[281] Eventually, Congress agreed, and the HUD-NAR testing restrictions were not included in the final version of the legislation.

Nevertheless, the Reagan administration has continued to support these testing restrictions. HUD is responsible for developing regulations to implement the FHIP program, and it has proposed regulations that include the NAR testing "guidelines."[282] If these regulations are allowed to become final, much of the potential of the FHIP program for effective fair housing enforcement will be lost. The new administration should eliminate any restrictions on testing from the FHIP regulations.

D. HUD's Affirmative Duties under Section 808: Federally-Assisted Housing and Other Development Grants

1. *Background*

Section 808 of the 1968 Fair Housing Act requires HUD and all other federal departments and agencies to administer their "programs and activities relating to housing and urban development in a manner affirmatively to further" the policies and purposes of Title VIII.[283] This mandate to affirmatively further fair housing policies applies to HUD's financial support for local public housing authorities and to a variety of other federal grants and programs.

Racial segregation in America's public housing was both illegal and widespread when the 1968 Fair Housing Act was passed. Ever since 1954 when the Supreme Court decided *Brown v. Board of Education*,[284] it has been clear that maintaining racially separate public facilities violates the Constitution.[285] In 1962, President Kennedy issued Executive Order 11063, which prohibits racial discrimination in federally-assisted housing. Two years later, Congress in Title VI of the Civil Rights Act of 1964 banned discrimination in any program or activity that receives federal financial assistance.[286] Despite these laws, most public housing was still heavily segregated by the time Title VIII was enacted. Against this background, Congress adopted Section 808 to require HUD to adopt a more aggressive approach to ending segregation in federally-assisted housing.[287]

HUD's record of meeting its affirmative responsibilities under Section 808 has not been good. In general, the statutory command to affirmatively take fair housing considerations into account has not prompted HUD to initiate changes in its funding procedures until adverse judicial decisions required HUD to do so. As a result, a growing number of Section 808 cases over the past twenty years have found HUD in violation of its affirmative fair housing duties.[288] Some of these decisions are reviewed in the next section, after which the Reagan administration's contributions to this unhappy record are discussed.

2. *HUD Violations of Section 808*

HUD has been accused of violating Section 808 in three different types of situations. First, HUD support for a particular housing project may be improper if that project is likely to increase racial concentration in the surrounding area. The principal case requiring HUD to consider a project's impact on local housing patterns is *Shannon v. HUD*,[289] an influential Third Circuit decision that spawned a number of challenges to HUD-funded projects in the 1970s. Eventually, HUD responded to these cases by reforming its methods for evaluating sites for new projects.[290] As a result of these reforms and also because HUD funds for new projects have become so scarce, the number of *Shannon*-type claims has fallen off in recent years.

Still, the legacy of HUD's historic insensitivity to the segregative impact of its funding new projects in areas of racial concentration continues to live on. The *Yonkers* case,[291] for example, provides dramatic evidence of how locating public housing projects exclusively in minority areas can lead not only to segregation in those projects, but also to increased and continuing segregation in the community as a whole.

The second type of Section 808 claim--and one that is still quite common today--is that HUD's financial assistance is supporting public housing authorities that are racially segregated. The most famous example of this type of case is *Gautreaux v. Romney*,[292] where HUD's funding of the segregated Chicago Housing Authority was held to have violated the Fifth Amendment.[293] Title VIII had not yet been enacted when the *Gautreaux* case was filed, but more recent challenges to HUD funding of segregated housing authorities rely on Section 808 as well as on the Constitution.

Examples of this type of case in the 1980s include *Clients' Council v. Pierce*,[294] which found HUD liable for supporting the segregated housing authority of Texarkana, Arkansas, and *Young v. Pierce*,[295] a similar holding based on HUD's funding of segregated housing authorities in thirty-six counties of east Texas. *Clients' Council* and *Young* are noteworthy, because they show that HUD is still capable of knowingly supporting racially segregated housing authorities in the modern era, years after Section 808 made such support illegal. As the federal district court in *Young* observed:[296]

> It has been clear at least since the passage of Title VIII. . . that HUD has had an affirmative duty to eradicate segregation. . . . HUD has a duty to know how its money is spent, and in fact has known that it is supporting segregated housing in east Texas. Notwithstanding, it has continued to actively support the system in perhaps the most effective possible way--by paying for it. HUD has thus played a crucial and continuing role in creating and maintaining a large system of publicly funded segregated housing.

The third type of Section 808 claim is that HUD has not been aggressive enough in trying to influence local governments to promote fair housing. In this type of case, the targets of HUD's supposed influence are not themselves housing suppliers. Thus, HUD's responsibility for local segregated housing patterns has been more difficult to establish than it has in the other two types of cases. For example, in *Anderson v. City of Alpharetta*,[297] the Eleventh Circuit rejected a Section 808 claim based on HUD's failure to pressure local officials in suburban Atlanta into accepting more low-income housing. The court felt that, because these officials received no federal funds, HUD lacked the power to influence them and therefore could not be accused of supporting their discriminatory practices.

Some local governments, however, do receive HUD funds in the form of Community Development Block Grants, Urban Development Action Grants, and the like. In these situations, courts have been more willing to fault HUD for failing to use its funding leverage to encourage local officials to attack segregated housing patterns in their area. A 1987 example is *NAACP, Boston Chapter v. HUD*,[298] where the First Circuit held that HUD could be sued for not requiring Boston to undertake a more effective fair housing program as a condition of the city's receiving various HUD grants. According to Judge Breyer's opinion, the case involved "the right to HUD's help in achieving open housing," a right that was viewed as important by the Congress that enacted Title VIII.[299]

The *NAACP-Boston* decision is important, because it makes clear that HUD's duty under Section 808 goes well beyond the basic constitutional obligation not to support purposeful discrimination. As the First Circuit wrote, Section 808 reflects the broader goal of having HUD "use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."[300]

3. *The Reagan Administration*

HUD's record of failing to administer its programs affirmatively to promote fair housing in violation of its Section 808 duties was well established before 1981. The Reagan administration's contribution has been to maintain and extend this unfortunate record. During the 1981-1988 period, HUD continued to fund many racially segregated housing authorities, and CDBG and other grants were rarely conditioned on recipients establishing an effective fair housing program.[301]

The disastrous consequences of this twenty-year record are hard to exaggerate. HUD's massive assistance programs affect vast numbers of people and housing units, far more than all of its other fair housing activities combined. The Reagan administration has seen to it that another eight years have gone by during which these programs have rarely been used to change segregated housing patterns and indeed have generally reinforced those patterns.

The Reagan administration, however, has gone beyond simply allowing HUD to continue to ignore its Section 808 duties. It has actually sought to reverse the fundamental thrust of Section 808 by actively opposing integration efforts of segregated public housing authorities. In partnership with the Justice Department, HUD has forbidden these authorities, on penalty of losing their federal financial assistance, from using race-conscious tenant assignment plans to integrate their units.[302]

In 1987, this policy of attacking race-conscious integration plans led HUD to carry out "the single largest compliance effort" in its history.[303] A total of eighty-three "compliance reviews" of public housing authorities around the country were conducted. In Kentucky alone, sixteen formerly-segregated authorities were notified that their pro-integration agreements with the state human rights commission were illegal. Under the threat of losing their HUD funds, all sixteen adopted what HUD termed "acceptable" tenant selection and assignment practices (*i.e.*, they abandoned their race-conscious plans).[304]

The dubious legality and disastrous impact of this anti-integration policy were reviewed above in connection with the Justice Department's record (see Part II-C-4-b). That discussion need not be repeated here, but one additional point should be made. Because of its affirmative duties under Section 808, HUD actually bears a greater legal responsibility than Justice for the harm wrought by their joint effort to attack the desegregation plans of local housing authorities. The Justice Department may have initiated this effort, but it was HUD whose statutory duty to affirmatively desegregate federally-assisted housing was being abandoned.

HUD's fervor at blocking race-conscious integration plans during the Reagan administration far exceeded its ability to come up with effective alternative ideas for desegregating public housing. HUD's proposals for achieving integration, which were not formulated until 1987, all basically relied on a voluntary "freedom of choice" approach. These proposals included creating magnet projects with enhanced amenities, conducting affirmative marketing programs, and improving security.[305] The belief that such efforts would succeed in reversing the effects of decades of HUD-supported segregation in public housing seems naive at best. Indeed, local housing authority officials reacted to these proposals by informing HUD that more aggressive, race-conscious methods were necessary.[306] Nevertheless, HUD has persisted with its limited approach, announcing just recently that its main thrust in 1989 would be to provide technical assistance to local authorities in how to use such voluntary measures under the "Public Housing Affirmative Compliance Agreement" program.[307]

Overall, therefore, the Reagan administration's record of ignoring the mandate of Section 808 has actually been much worse than those of prior administrations. During the 1981-1988 period, the essence of HUD's approach was to continue to fund housing authorities in places like east Texas that maintained racial segregation through purposeful discrimination, and then to direct the largest compliance effort in its history against housing authorities in Kentucky and elsewhere that tried to end segregation with race-conscious assignment plans. In other words, HUD not only failed to act affirmatively to further fair housing, it actually sought to destroy the modest progress some local authorities had been able to make on their own. These HUD policies amounted to more than simply ignoring Section 808. They were an attempt to reverse the affirmative mandate that Congress wrote into the Fair Housing Act.

IV. Conclusions and Recommendations

A. In General

The time is ripe for major improvements in the federal fair housing enforcement effort. Historically, that effort has been ineffective and even indifferent. Some isolated steps forward have occurred, but in general, the federal government bears a large portion of the responsibility for the nation's continuing high levels of residential segregation and discrimination.

The newly-amended Fair Housing Act gives the new administration an unprecedented opportunity to reverse this unhappy record. For the first time, the legal tools are now available for the federal government to mount an aggressive challenge to housing discrimination in America. Discriminatory housing practices and widespread segregation are not unalterable facts of life. They are human inventions. They can be changed by a strong law, vigorously enforced.

Success is by no means assured, however. The federal government's lack of commitment to fair housing did not begin with the Reagan administration, and the end of that administration will not automatically result in new attitudes and new policies. In order to succeed, the leaders of the new administration must have the will to fulfill the promise of the new Fair Housing Act. The need is for the new president and other senior officials to demonstrate that they are committed to establishing a national ethic of nondiscrimination and truly open housing. Some of the specific ways that this can be done are by:

(1) Appointing people to key posts at Justice and HUD who have a strong commitment to vigorous fair housing enforcement;

(2) Insisting on adequate funding and staff for Justice and HUD to carry out the new responsibilities imposed by the 1988 Fair Housing Amendments Act, recognizing that current estimates for needed new funding and staff are clearly inadequate; and,

(3) Providing strong public leadership in support of fair housing and in particular in support of minority families who have been victimized by violence for moving into white neighborhoods, including strong condemnation of such violence as criminal and un-American behavior.

Additional specific recommendations with respect to the Justice Department and HUD are set forth in the next two sections.

B. Department of Justice

1. Re-establish the Department's historic leadership role in the development of fair housing law through vigorous prosecution of a variety of cases and advocacy of a broad and generous interpretation of Title VIII in these cases and as *amicus curiae* in private cases.

2. Establish positive working relationships with private fair housing organizations and state and local enforcement agencies in order to become aware of developments in this field and to help these groups respond to these developments.

3. End the policy of overvaluing settlement as the preferred technique for resolving Title VIII cases (that is, evaluate the possibility of settlement in each case on its individual merits apart from a general pro-settlement policy and recognize the negative implications of a pro-settlement policy for a public enforcement agency with limited jurisdiction).

4. Rescind the policy of not prosecuting Title VIII cases based on the discriminatory effect theory and return to the pre-1981 policy of relying on this theory in appropriate cases.

5. Rescind all other policies that hamper effective enforcement of Title VIII and that are not consistent with established judicial decisions (for example, refusal to file discriminatory land use cases; refusal to seek full affirmative relief).

6. Re-evaluate the Department's position on the legality of race-conscious methods of fostering housing integration. Specifically:

a. Fully account for the value of residential integration in Title VIII law, which would include recognizing the legality of certain types of race-conscious programs as a necessary part of a national commitment to desegregating America's housing and providing for truly open housing markets.

b. Consider dismissing *Charlottesville* and other cases against local public housing authorities whose remedial efforts to desegregate their units are not inconsistent with Supreme Court affirmative action decisions.

c. Consider dismissing or settling *Atrium Village* to avoid a further misuse of resources in that case.

7. Consider re-establishing the organizational structure of having a separate Housing Section within the Civil Rights Division to handle only Title VIII cases in order to emphasize the importance of fair housing matters and to reflect the increased demands that the 1988 Fair Housing Amendments Act will place on the Division in this area.

C. Department of Housing and Urban Development

1. Over the past twenty years, HUD has generally not played an effective role in fair housing enforcement. Part of the reason for this weak record has been shortcomings in the 1968 Fair Housing Act, itself. Virtually all of these statutory problems have now been remedied by the 1988 Amendments Act. The key question now is whether HUD personnel will be able and willing to use their new authority effectively. This means that HUD will have to overcome a twenty-year "mind set" of believing that only modest achievements are possible or even appropriate.

To accomplish this will require strong leadership from the top. This especially means the Secretary and the General Counsel, not just the Assistant Secretary for FHEO and FHEO's division chiefs. Furthermore, the new Secretary, General Counsel, and Assistant Secretary for FHEO must know that they have a mandate from the president, as well as from the Congress, to vigorously enforce the new law. Everything else depends on this. More specific policy recommendations follow.

2. An immediate priority for the new administration is for HUD to meet the Amendment Act's deadline of March 12, 1989, for issuing interpretive regulations. A review of the Reagan administration's work on these regulations must be conducted to insure that the resulting regulations are consistent with Congress's intent to provide for an effectively enforced Fair Housing Act. To the extent that the Reagan administration has already issued regulations that are inconsistent with this intent, those regulations must be rescinded and appropriate new ones issued in their stead.

3. Similarly, HUD regulations under the new Housing and Community Development Act concerning the Fair Housing Initatives Program must not unduly restrict grant recipients' ability to conduct testing, engage in litigation, and otherwise challenge discriminatory housing practices. To the extent that the Reagan administration has already issued regulations that do impose such restrictions, those regulations must be rescinded and appropriate new ones issued in their stead.

4. HUD policies generally should recognize that testing and litigation are essential elements of any effective fair housing enforcement program. In particular, the FHIP grant program should reflect this recognition by encouraging recipient agencies and organizations to conduct such activities.

5. HUD should immediately re-evaluate its policy of challenging race-conscious methods of fostering integration used by public housing authorities and other recipients of HUD funds. These efforts should be permitted and encouraged to the extent they are not inconsistent with Supreme Court affirmative action decisions.

6. HUD should comply with its Section 808 duties by imposing conditions on its Community Development Block Grants (CDBGs), assisted housing, and other funding programs that would require grant recipients to act affirmatively to end discrimination and segregation and to increase the supply of genuinely open housing. In particular, HUD should immediately cease funding public housing authorities that are purposefully maintaining segregated facilities.

7. HUD should make a vigorous effort to collect and disseminate demographic data on tenants and other beneficiaries of HUD programs, to regularly conduct and publish studies on the nature and extent of housing discrimination in the United States, and to otherwise fully comply with the research and data collection requirements of the 1988 Amendments Act. In addition, HUD should annually provide a clear, consistent, and thorough statistical report on the number and disposition of Section 810 complaints. This report should include a review of conciliation agreements reached, hearings conducted, and relief obtained, as well as trend comparisons with previous years and an analysis of those trends.

8. HUD should conduct an effective public information program on the new Fair Housing Act, which would include a serious outreach program designed to encourage victims of housing discrimination to file complaints.

9. HUD should encourage state and local governments to enact or amend their fair housing laws to achieve "substantial equivalency" with the amended Title VIII. HUD's evaluation of such laws, however, must comply with the requirements and the intent of the 1988 Amendments Act, so that referrals of Section 810 complaints are made only to agencies whose laws are truly equivalent to Title VIII in all major respects.

10. HUD should re-evaluate and, if necessary, renegotiate its Voluntary Affirmative Marketing Agreements (VAMAs) and other voluntary compliance agreements to insure that these agreements provide for meaningful commitments to fair housing by real estate signatories and in no way inhibit legitimate fair housing enforcement techniques.

11. HUD should insist on adequate staff and staff training to carry out its new responsibilities under the 1988 Fair Housing Amendments Act, recognizing that its current staff is not adequately trained

to carry out the investigation, conciliation, and prosecution functions of a civil rights agency with substantial enforcement powers.

12. HUD should establish a positive working relationship with Justice Department personnel who will be prosecuting Section 810 cases in court, so that the two departments share an understanding of the legal standards and other factors that govern these cases.

APPENDIX

FAIR HOUSING ACT AMENDMENTS OF 1988

by Jeffrey D. Robinson

I. Introduction

The Fair Housing Amendments Act of 1988 (FHAA) presents civil rights advocates with one of their biggest challenges and opportunities. Intended to fulfill the 1968 Fair Housing Act's promise of nondiscrimination in housing, the FHAA strengthens the existing mechanisms for enforcing the national policy against housing discrimination and expands the reach of that policy to protect additional people.

The heart of the bill is its complete rewriting of the enforcement provisions of the 1968 Act. Under the new law the Department of Housing and Urban Development's (HUD) role in investigating complaints of discriminatory housing practices is significantly enhanced. HUD is also given authority, for the first time, to bring administrative actions to remedy discrimination, as well as authority to refer matters that cannot be resolved administratively to the Department of Justice (DoJ) for litigation.

In addition, the FHAA adds two new protected classes to the Fair Housing Act. First, discrimination against those with handicaps is now banned. This addition brings the fair housing laws in line with other antidiscrimination provisions, and reflects awareness that handicapped persons face substantial discrimination in this area. Second, the bill outlaws housing discrimination directed at families with children.

The opportunities for those concerned with fair housing are obvious. Their challenge is to devise structures within the federal government, as well as on the state and local levels, that effectively utilize this enhanced enforcement authority. To meet this challenge, consideration must be given to how to organize HUD and DoJ to perform their new enforcement functions. The impact of the exemptions in the protection afforded the new protected classes on overall enforcement must be considered. Hopefully, this paper is one step in that process. It briefly sets forth the history of the FHAA, describes the statute's key provisions in some detail, and identifies some of the important issues that will face those who attempt to use the tools provided by the FHAA to make the promise of the 1968 Fair Housing Act a reality.

II. Legislative History

The FHAA faced a long and tortuous path to enactment. Its roots go back to the sustained effort in the 96th Congress to pass fair housing legislation which, like the FHAA, strengthened the enforcement mechanism by creating an administrative remedy and extended protection to persons with handicaps.[1] Although that legislation, H.R. 5200, was passed by the House of Representatives, it was ultimately defeated by a filibuster in the Senate during the post-1980 election "lame duck" session.

Although the opponents of H.R. 5200 promised early action on fair housing in the 97th Congress, there was essentially no real progress toward enacting legislation until the 100th Congress. This lack of progress was not for want of continued work by those in the congress concerned about fair housing. Legislation was introduced in each ensuing congress and hearings were held in the House Judiciary Committee, Subcommittee on Civil and Constitutional Rights during the 99th Congress. Rather, the lack of progress reflected the limited resources of the civil rights community; the press of other matters, such as the Voting Rights Act Extension and Civil Rights Restoration legislation (*Grove City*); and the political reality of continued Republican control of the White House and Senate.[2]

With the return of the Senate to Democratic control after the 1986 elections, fair housing legislation received renewed attention. Along with passage of the Civil Rights Restoration Act, passage of fair housing legislation was the principal priority of the civil rights community--a priority that was shared by the leadership of the Senate and House Judiciary Committees.

Identical fair housing bills were introduced in the Senate and House on February 19, 1987 (S. 558 in the Senate and H.R. 1158 in the House). Six days of hearings on the legislation commenced in the Senate Judiciary Committee, Constitution Subcommittee on March 31, 1987, and were completed on July 1, 1987. On June 27, 1987, the Subcommittee reported the bill to the full committee with an amendment in the nature of a substitute offered by the bills' principal Senate sponsors.[3]

At this point, Senate action on the bill stalled because of the press of other events. On July 1, 1987, while the final hearing on the fair housing legislation was underway, President Reagan announced his appointment of Judge Robert Bork to fill the vacancy on the Supreme Court created by the retirement of Justice Powell. The Senate Judiciary Committee spent the next eight months consumed by the effort to find a replacement for Justice Powell and never, as a committee, returned to consideration of fair housing legislation.

The House Judiciary Committee, Subcommittee on Civil and Constitutional Rights, also held extensive hearings on its version of fair housing legislation during 1987. Five days of hearings were held between April 29, 1987 and May 14, 1987. On March 3, 1988, that subcommittee reported the bill to the full House Judiciary Committee with an amendment in the nature of a substitute that incorporated the changes made in the Senate, as well as other modifications. By a vote of 26 to 9, the House Judiciary Committee reported the FHAA to the House on April 27, 1988.

During each step of the committee process, substantial changes were made in the details of the legislation. Although the principal features of the legislation remained constant throughout--enhanced enforcement authority to HUD and new protections for those with handicaps and for families with children--the details of the provisions were adjusted and readjusted in an effort to reach a final product that would achieve the goals of the FHAA's proponents and pass Congress.

Compromise was necessary because the administration and some interested groups, notably the National Association of Realtors, had several problems with S. 558 and H.R. 1158 as introduced. While opponents expressed general agreement with the legislation's principal goal of strengthening enforcements, they articulated substantial opposition to many of its specific provisions. Among the problems most often raised by opponents were: (1) questions concerning the fairness of having the decision-makers in the administrative process working for the same agency that brought cases; (2) concerns about the constitutionality of resolving discrimination claims in a forum where there was not a right to trial by jury; (3) disagreement with extending protection to familial status discrimination; (4) opposition to utilizing the "effects test" in housing discrimination cases; and (5) support for including a provision addressing the appropriateness of using race-conscious methods to obtain or maintain residential integration.

Ultimately, a compromise was struck. The opt-out provision, discussed below, was crafted to answer the constitutional and fairness concerns surrounding administrative enforcement. Proponents of the legislation prevailed on the inclusion of familial status protection and the validity of the "effects test." And, the questions of the appropriate use of race-conscious measures was left for continued development in the courts.

On June 29, 1988, the House of Representatives, by a vote of 376 to 23, passed Fair Housing legislation. The Senate followed suit on August 2, 1988, and passed the FHAA (with minor changes from the House bill) by an overwhelming vote of 94 to 3. The House concurred with the Senate's changes on August 8, 1988, and President Reagan signed the bill into law on September 13, 1988.

III. Key Provisions

A. Enforcement

As noted above, one of the principal motivations for fair housing legislation was dissatisfaction with the federal role in enforcing the 1968 Act's nondiscrimination command. Prior to passage of the FHAA, HUD's role in resolving housing discrimination complaints was limited. HUD's only authority was to bring the parties involved together and encourage them to reach a voluntary settlement. This process was known as a conciliation, and was widely criticized, because if either party refused to enter into a settlement, HUD was left with no further role in enforcement. This left the victim of discrimination with the costly and time-consuming task of bringing legal action as the only means of obtaining relief. DoJ did have some authority to bring housing discrimination suits; however, that authority was of limited or no use to an individual because it was restricted to suits raising issues of national importance and involving a pattern and practice of discrimination.

The FHAA worked a fundamental change in this situation. While the individual victim of discrimination retains the right to file suit--a right greatly enhanced by changes in the punitive damages and attorney fees provisions of the law--the FHAA creates a greatly enhanced role for the federal government in enforcing the law.

B. HUD

Upon receipt of a complaint of housing discrimination, or at its own initiation, HUD is empowered by the FHAA to institute an investigation to determine if a charge should be issued.[4] The complaint must be filed within one year of the occurrence of the alleged discriminatory housing practice,[5] and the law requires that HUD's investigation be completed within one hundred days of the filing. During the investigation HUD is authorized, and encouraged, to attempt to work out a settlement between the adverse parties in a fashion similar to its conciliation efforts under the 1968 Act. In order to encourage alternative dispute resolution, a settlement agreement may contain the parties' agreements to submit their dispute to binding arbitration. Once it is accepted by the parties, HUD can enforce a settlement agreement against a violating party by having DoJ file a civil suit.

If HUD determines, during the investigation of a complaint, that preliminary judicial relief, a temporary restraining order, or preliminary injunction is necessary to preserve the rights of the parties, it may request that DoJ file and maintain an action in federal district court seeking such relief. Filing such an action has no affect on HUD's ability to proceed with its investigation or pursue an administrative resolution of the complaint.

Upon completion of its investigation, HUD is required to issue a "charge" if it finds that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur.[6] A charge is analogous to a complaint in civil litigation and consists of "a short and plain statement of the facts upon which [HUD] has found reasonable cause. . . ." {Section 810(g)(2)(B)}. In order to avoid duplication of effort, no charge may be issued if the trial has commenced in a civil action concerning the practices that are the subject of HUD's investigation. If reasonable cause is not found, HUD is required to dismiss the complaint and give public notice of its action.

After a charge is issued and the parties informed of HUD's action, any complainant, aggrieved person, or respondent has a right to have the charge heard in a civil proceeding in United States District Court rather than in HUD's administrative proceeding. Granting this right of election was the major change in the enforcement mechanism between S. 558 and H.R. 1158 as introduced, and the FHAA as enacted. The change was made to satisfy those who questioned the constitutionality and fairness of assigning all claims to an administrative proceeding without a right to trial by jury.[7]

Providing this ability to opt out of administrative procedures may create real difficulties for fair housing enforcement. A basic premise of the FHAA is that administrative enforcement is quicker and more effective than judicial proceedings in routine cases. If the benefits of administrative enforcement are to be obtained it will be incumbent upon HUD to operate the process in a manner that makes administrative enforcement preferable to the aggrieved persons and those charged with discrimination.

A prerequisite to making the system work is creating the perception that ALJ's are fair and impartial. Much of the criticism concerning administrative enforcement from the real estate community was couched as concern about the impartiality of ALJ's. If ALJ's are not perceived as fair, the party that perceives unfavorable bias will opt for federal court.

Another requirement for keeping parties in the administrative system is meeting the statutory time limits for processing cases. Administrative procedures were sold as providing swifter resolutions than court; failure to achieve that goal will negate the principal basis for aggrieved persons to favor this system.

In addition to resolving cases quickly, administrative procedures were also intended to be more efficient and less expensive than court. The FHAA does not specify how this efficiency is to be achieved, leaving it to HUD to design procedures that will be efficient, inexpensive, and fast, without compromising fairness. Creation of procedures that meet these goals will go a long way toward keeping parties in the administrative process.

Finally, when cases are taken to court, judges and juries must be convinced to apply the enhanced civil penalties available in court actions. The differences between the penalties available in administrative and judicial procedures were created both to respond to concerns that ALJ's are likely to favor the agency, and to act as an incentive for persons charged with discrimination to allow the case to proceed administratively. If courts are unwilling to use these sanctions, that incentive will disappear.

If no party elects to have the matter referred for civil action, an administrative hearing is held to resolve the charge.[8] The hearing is supposed to be held within 120 days of the issuance of a charge and the Secretary of HUD is directed to promulgate rules and regulations that will enable the parties to complete their discovery and preparation in the allotted time. Within sixty days of the completion of the hearing the ALJ is required to issue findings of facts and conclusions of law.

Upon a finding that the respondent has committed--or is about to commit--a discriminatory housing practice, the ALJ may award actual damages to the aggrieved person, issue an injunction or impose other equitable relief, or assess a civil penalty of not more than $10,000 for a first-time offense, $25,000 for a second offense committed within five years, and $50,000 for a third or subsequent offense committed within seven years.[9] ALJ's may not issue orders that affect a transfer of interest in the property under dispute to a purchaser who entered into the transaction without actual notice that a charge was pending.

The Secretary of HUD is given thirty days to review a finding by an ALJ and may approve, reject, or modify the decision. If the Secretary takes no action in the allotted time, the order of the ALJ is deemed final. Once an order is final, a person aggrieved by the order may seek review in the Court of Appeals for the circuit in which the alleged discriminatory housing practice occurred. Petitions for enforcement of orders are also filed in the Court of Appeals for the circuit in which the alleged discriminatory housing practice occurred.

The principal anticipated benefits from this administrative procedure are: (1) the victim of discrimination is relieved of the financial burden of bringing a civil action--he can rely on HUD to prosecute his case and recover damages; (2) the tough sanctions available to the ALJ provide an incentive for defendants to settle cases during the investigation stage that is absent under the preexisting law; and (3) the hearing process should take significantly less time than a court proceeding in a similar case. It is this last benefit which is particularly unique to the administrative process and particularly open to question.

In theory, an administrative hearing should commence within a maximum of 220 days of a complaint being filed with HUD--100 days for investigation and 120 days between issuance of the charge and hearing commencement. Given the sixty-day requirement for issuing findings of fact and conclusions of law and the thirty days provided for Secretarial review, all complaints should be completely through the administrative process within one year. There is, however, no effective way to mandate and enforce time limits for these functions because of the difficulty of devising appropriate sanctions for noncompliance.

The drafters of the FHAA attempted to solve this problem by setting mandatory dates and requiring an annual report to Congress by the Secretary of HUD detailing the number of cases in which the deadlines were not met and specifying the reasons for the failures. It is hoped that the spotlight of disclosure will keep HUD working to meet the deadlines, and that the report will give Congress the information it needs to provide resources adequate to the task of enforcing the law.

If a party elects to have a charge, issued by HUD, tried in court rather than in the administrative proceeding, HUD refers the case to DoJ. DoJ is required to file suit on the charge in the federal district court for the district in which the alleged discriminatory housing practice occurred. The case then proceeds as a normal civil action, and the court is authorized to issue the same relief it could grant the government in a suit brought under DoJ's general authority to sue. The court can also provide relief to an aggrieved person who intervenes in a proceeding brought by DoJ that is identical to that available under the private right of action provisions.

C. Department of Justice

In addition to requiring DoJ to seek preliminary relief when HUD thinks it is appropriate, bring all federal cases concerning the legality of a state or local zoning or land use provision, and litigate charges on behalf of individual aggrieved persons when one party elects to have a HUD charge tried in court, the FHAA continues DOJ's independent authority to bring suit when the attorney general has reasonable cause to believe that persons are engaged in a pattern or practice of discriminatory housing practices and the matter raises an issue of general public concern.

In such suits, as well as in actions pursuant to a HUD charge, the court can award a full range of equitable remedies, including mandatory and prohibitory injunctions, as well as monetary damages to aggrieved persons. The court may also impose a civil penalty of not more than $50,000 for a first offense and $100,000 for a subsequent offense, penalties two-to-five times as large as those available in administrative procedures.

Structuring DoJ to handle its increased case load of fair housing cases, attributable to the FHAA, may be the most important enforcement issue faced by the next administration in this area. DoJ is faced with a requirement that it tackle fair housing cases that it would never have considered under its existing pattern and practice authority. DoJ will also find itself forced to litigate cases that are not of its choosing and operating in a quasi-representative capacity vis-a-vis aggrieved persons in HUD-initiated charges. These roles may present problems.

DoJ's housing enforcement is currently centralized in a section of the Civil Rights Division based in Washington, D.C. This represents a change adopted by the current administration in response to previous decentralization, and resulting complaints that U.S. Attorneys were not paying sufficient attention to housing discrimination cases. While this may be an entirely rational response to the question of how best to organize to bring major cases raising issues of national concern, it is unclear that it is an appropriate structure for litigating claims on behalf of individual aggrieved persons located around the country.

It is equally unclear whether the Civil Rights Division has the resources to handle all the individual complaints that may arise if parties frequently opt out of the administrative process. It would be a major, and inappropriate, shift in the use of the Division's resources if it were to concentrate on bringing individual fair housing cases to the exclusion of the major impact cases in all areas that have been its focus in the past.

Under these circumstances serious attention must be given to either providing the Civil Rights Division with substantial new resources or having the United States Attorneys assume responsibility for handling HUD charges that are referred to DoJ for litigation. The second option, naturally, raises concerns about ensuring quality and about the commitment that U.S. Attorneys, who traditionally focus on criminal matters, will make to these cases.

D. Private Persons

Although the enforcement changes made by the FHAA are principally designed to enhance federal enforcement, the act also preserves and enhances the private right of action in housing discrimination cases. An individual who believes that he has been the victim of discriminatory housing practices need not complain to HUD and can, instead, choose to bring a private action seeking relief. Even if a person chooses to go to HUD he is, notwithstanding, free to file his own complaint on the matter in court, up until the time that the administrative hearing commences. During the course of an administrative proceeding, or an action on a charge litigated by DoJ, he is free to intervene in the matter and participate fully. In short, the FHAA provides ample opportunity for the private person, with access to legal representation, to assert his position and ensure that the government does not take steps to his detriment.

For those who choose to pursue a private action rather than allow the government to bring the case, the FHAA provides three substantial improvements over the 1968 Act. First, the statute of limitations is extended from 180 days to two years. Second, the $1,000 limitation on punitive damages in the 1968 Act is eliminated. And third, the attorney fees provision is brought into line with those under the Civil Rights Attorney Fees Act. This change allows attorney fee awards to prevailing parties regardless of their ability to finance the litigation.[10]

E. New Protected Classes

In addition to strengthening the federal enforcement mechanism in housing discrimination cases, the FHAA also adds two new classes to the Fair Housing Act's list of persons against whom discrimination is prohibited. The provision of coverage to persons with handicaps brings the fair housing law into conformity with other major civil rights laws, while its provisions of protection against discrimination to families with children breaks new ground in the antidiscrimination field. Devising a program to administer the new prohibitions against discrimination in these areas will be another major task of the next administration; a task that will be complicated by the fact that the federal government will bear the lion's share of enforcing these provisions until, and unless, states and localities amend their existing fair housing provisions to provide protection for these classes, and subsequently receive certification to handle these complaints on referral from HUD.

F. Persons with Handicaps

For purposes of defining the new protected class of handicapped persons, the FHAA borrowed heavily from existing federal statutes, particularly Section 504 of the Rehabilitation Act. Handicapped is defined with respect to a person as (1) one having a physical or mental impairment which substantially limits one or more of his major life activities, (2) one having a record of such an impairment, and (3) one being regarded as having such an impairment. Explicitly excluded from the definition are persons currently illegally using, or addicted to, a controlled substance, and transvestites.[11] Also excluded from the protections of the legislation are persons whose tenancy would pose a direct threat to the health and safety of others, or result in substantial physical damage to the property of others.

The act provides that it is unlawful discrimination to refuse to make a unit available for rent or sale on account of the purchaser's or renter's handicap, the handicap of a person intending to live in the unit, or the handicap of a person associated with the purchaser or renter. The FHAA then goes on to break new ground in federal housing discrimination law by making it illegal to refuse to permit reasonable physical modifications to a unit or reasonable modifications in rules or regulations to afford a handicapped person "full enjoyment" of the unit. This requirement is limited only by the condition that, "where it is reasonable," the landlord may require the premises to be restored to their original condition at the end of the tenancy. The FHAA also requires that multifamily buildings constructed in the future meet specified levels of accessibility to persons with handicaps and adaptability to their special needs.

The controversies surrounding these provisions, and the difficult enforcement issues for those who will administer the law, tended to cluster around two issues. The first issue is how to treat persons such as former addicts, those with mental illnesses, and persons with communicable diseases--particularly AIDS, who some, unreasonably, fear present a danger to health and safety by their mere presence. Some legislators sought to restrict the definition of handicapped persons to exclude these people, arguing that compelled association with them would constitute a danger to other residents. Although most of their attempts to modify the definition of handicapped failed, adherents of this view did succeed in having the "danger to the health and safety of others" and "substantial damage to their physical property" language added.

The second set of concerns involves the impact, economic and otherwise, of the mandated accommodation portions of the handicap provisions. Unlike other forms of housing discrimination, discrimination against the handicapped cannot be eliminated solely by requiring that people be treated identically--it of course requires that as well. Elimination also requires that additional consideration be given to persons with handicaps to allow them access to, and use of, housing facilities. These accommodations may range from the minimal and unobtrusive--modifying a "no pets" rule to allow a seeing-eye dog, or allowing a tenant in an apartment to remove an interior door to make a room wheelchair accessible--to the expensive--installing lifts and ramps to provide access to the facilities of a multilevel building. The question for the drafters of the FHAA, and for those who will administer it, is how to fairly apportion the financial and other burdens of eliminating discrimination.

In many respects, the FHAA, like much legislation, avoids the difficult questions. It requires landlords to permit "reasonable" modifications and permits them to require restoration only when it is "reasonable" to do so. It is, however, silent with respect to what is reasonable in these circumstances, and leaves it to individual court cases and/or regulations to fill in the details. An important early task in administering this act will be to provide guidance to tenants and landlords concerning the meaning of these provisions.

G. Familial Status

The addition of familial status to the list of protected classes will also create considerable work for those charged with administering the FHAA. Although the definition is simple--familial status is defined as the presence of persons under 18 with their parent, legal guardian, or appropriate designee--complications arise because of a substantial exception to the antidiscrimination command of this provision.

While in the other areas of housing discrimination there is a general consensus that discrimination is always bad, no such consensus developed with respect to discrimination against families with children. In fact, from the beginning there was considerable agreement that it was appropriate to bar children from certain housing which was specifically designed for what came to be called "older persons." As a result, the prohibition on discriminating against families with children in the FHAA does not apply to housing which is (1) provided under state or federal programs to assist the elderly, (2) intended for, and solely occupied by, persons over sixty-two years of age, or (3) intended and operated for occupancy by at least one person fifty-five years of age or older, provided that it has facilities specifically for such persons--at least 80 percent of the units meet the one-person-over-55 requirement--and the rules and regulations indicate an intention to be operated for older persons. The Secretary of HUD is directed to develop rules and regulations that will clarify the third portion of the exemption, and that, of course, is the first difficult task facing those administering the Act.

More troubling than the vagueness of this provision is the fact that it may be indicative of a lack of commitment to eliminating this form of discrimination. A review of the hearings indicates that no consensus developed as to why discrimination against children should be illegal. Some argued that it served as a pretext for racial discrimination. Others expressed concern over the availability of housing suitable for, and affordable by, families. Still others articulated the more traditional antidiscrimination rationale that society should not be separated on the basis of age in housing because it stigmatizes and creates unhealthy communities. Depending upon which rationale is accepted, the design and implementation of a vigorous enforcement program may vary. Absent the development of a consensus supporting this provision, there is a real danger that its enforcement may be relegated to a back seat, with atten tion focused upon the enforcement of other aspects of the law which have a more developed constituency.

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CHAPTER XVIII

THE PROPOSED ENGLISH LANGUAGE AMENDMENT TO THE UNITED STATES CONSTITUTION

by David Billings

I. Introduction

An important debate is now taking place throughout the United States over language policy. Accompanying the relative increase in the number of Asian and Latin American immigrants to the U.S. is the claim that these new Americans are not learning English as quickly as their European predecessors.

Some have argued that state and federal programs providing for language assistance in voting, education, and certain governmental services discourage English learning, thereby hindering the political and economic assimilation of non-English-speaking persons. Over the past decade, critics of these programs have banded together under the rubric of the "English-only" movement.[1]

Recently, backers of English-only have spearheaded efforts at both the state and federal levels to give the English language an official status. At the state level, these efforts have resulted either in statutory enactments or constitutional amendments declaring English the official language.[2] At the federal level, English-only supporters have so far been unsuccessful at passing a resolution to amend the United States Constitution by declaring English the official language. Six versions of the English Language Amendment (ELA) were pending before the House and Senate Judiciary Committees at the end of the 100th Congress.

Since our national inception, English has coexisted alongside a variety of minority languages, none of which threatened to displace English as our predominant language. The fact that many Americans today are bilingual is a source of national strength and not evidence that the role of English is diminishing.

At first glance, an English Language Amendment appears benign in its effect, analogous to a law recognizing a state flower or an official song. In a national survey last year, nearly two-thirds of the respondents assumed that English already is the official language in this country. This response undoubedly stems from the unchallenged and predominant role English plays in American society.

Knowledge of English is an essential key to full participation in American political and economic life, a fact which has clearly not escaped today's immigrants. Contrary to the assertions of English-only proponents, recent studies have demonstrated that they are in fact learning English at least as fast as their predecessors.[3] Indeed, the inducements to learn English today are arguably stronger than ever considering that English is now the principal language of international trade and commerce.

The effect of English-only laws is not just to make official what is already the *de facto* language of the land. By eliminating language assistance programs, these laws may deny access to the ballot box and to important government services for Americans who are not yet proficient in English. The argument made by English-only advocates--that withholding language assistance will promote the learning of English--finds no support in fact or logic. Eliminating multilingual voting materials for non-English speaking Americans, for example, will in no way contribute to their desire to learn English. Elections take place only infrequently and thus do not impact on non-English-speaking persons regularly enough to influence their behavior one way or another. On the contrary, as one author has stated,"[t]he direct effect on disenfranchised individuals is likely to be their further alienation from the political process."[4]

While facially neutral, English-only laws in practice may serve as pretexts for intentional national origin discrimination. The Equal Employment Opportunity Commission (EEOC), for example, recognizes that, "[t]he primary language of an individual is often an essential national origin characteristic. . ."[5] From the standpoint of the Anglo-American, another person's use of a foreign language can idenify that individual as being of foreign extraction or as having a specific national origin.[6] As one author has written, "Language is an automatic signaling system, second only to race in identifying targets for possible privilege or discrimination."[7]

This chapter focuses specifically on several versions of the proposed English Language Amendment to the U.S. Constitution. It does not discuss the many legislative initiatives currently being debated in states throughout the country which would mandate the use of English-only in a variety of settings. State English-only laws may have a widespread impact in areas of the law where the federal role is relatively minor (police protection, business regulations, state court proceedings), or where courts traditionally defer to legislatures.

While proscribing language assistance for Americans with limited English proficiency at the state level deprives such individuals of needed services, the adverse effects are at least moderated by federal statutes that require language assistance in certain circumstances to non-English speaking Americans in the areas of education, federal court proceedings, and voting. Moreover, a broad construction of a state language law invalidating remedial and other assistance programs would arguably violate the equal protection clause of the fourteenth amendment.[8] While no court has deemed minority-language Americans to be a quasi-suspect class when they claim an affirmative right to government accommodation, the courts have yet to rule on the application of English-only laws that force a withdrawal of existing services.[9] Arguably, these laws should meet a higher constitutional standard than the mere rational basis test.

The argument made by English-only advocates--that withholding language assistance will promote the learning of English--finds no support in fact or logic.

An English Language Amendment to the U.S. Constitution would have potentially far wider implications than state English-only laws. Under the supremacy clause, such an amendment would automatically supersede any contrary law, state or federal.[10] Each of the federal statutory programs that Congress has created over the past three decades in favor of Americans with limited English proficiency, including language assistance in voting and public education, would be threatened, if not rendered facially invalid by the new amendment. Before turning to the substance of these statutory rights and programs, this paper first briefly traces the history of the English-only movement in the United States.

II. A Short History of the English-Only Movement

The current debate over the status of English in the United States is merely the latest installment of a national language debate as old as the United States.[11] The framers of the Constitution considered the question of an official language for the infant republic but ultimately rejected it as an unnecessary infringement of liberty.[12] Unlike the federal government, which has always conducted its affairs exclusively in English, the history of state governments presents a surprisingly multilingual profile. Pennsylvania's laws were published in German and English from 1805 to 1850, and from 1804 to 1867, Louisiana published its laws in French as well as in English.[13] California's constitution of 1849 was printed in English and Spanish and provided that all laws be published in English and Spanish as well.[14]

At the beginning of this century, language diversity in the United States prompted legislative efforts to curtail the use of languages other than English. Efforts to assimilate the waves of immigrants from southern and eastern Europe led to the founding of the"Americanization movement."[15] The movement was a loosely organized collection of groups dedicated to"Americanizing" these immigrants as quickly as possible with a particular emphasis on the teaching of English. The positive contribution made by these groups in promoting English proficiency is undeniable. However, the movement also provided a home for nativists and immigration restrictionists. These groups were less concerned about promoting the English language than about the perceived threat from the influx of foreign ideas and influences.[16]

The advent of World War I and the resulting anti-German backlash fostered widespread opposition to foreign languages. Speaking English became a banner of "100 percent Americanism," while speaking German was considered tantamount to giving aid and comfort to the enemy, if not engaging in outright subversion.[17] Several states enacted statutes and issued emergency orders banning the German language on the street, in religious services, on the telephone, and in the schools.[18]

By 1919, fifteen states had passed legislation installing English as the sole language of instruction in all public and private primary schools.[19] In *Meyer v. Nebraska*, the Supreme Court struck down a Nebraska law that forbade the teaching of any modern language other than English to any child who had not passed the eighth grade.[20] In holding that the law infringed the teacher's liberty interest protected under the due process clause of the fourteenth amendment, the Court stated:

> "The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution--a desirable end cannot be promoted by prohibited means."[21]

The many state efforts to proscribe the use of languages other than English were complemented by federal language qualifications as a condition for immigration and naturalization. Literacy tests for admission to the United States became a goal of immigration restrictionists, some of whom wanted to base admissibility on English proficiency.[22] During World War I, the National Americanization Committee proposed requiring all aliens to learn English and apply for citizenship within three years or face deportation.[23] It was not until the imposition of direct controls on immigration in the 1920s that English ceased to be used as a covert weapon in the fight against perceived alien infiltration. In the end, the Americanization movement demonstrated that facially neutral English-promoting laws can be easily manipulated to foster nonlinguistic ends and conceal racist prejudices.[24]

Whereas the Americanization movement of the early twentieth century was aimed at immigrants from southern and eastern Europe, the English-only movement of today is targeted principally at the Spanish-speaking population in the United States. Just as the Americanization movement succeeded in promoting early acquisition of English skills, backers of the English-only movement today profess a desire to encourage the learning of English. Notably absent from the statements of many English-only advocates, however, is any support for English remedial and education programs to fill the void left by the programs they would eliminate. This suggests other nonlinguistic motives, which the history of the Americanization movement reveals is not unprecedented. In fact, there is evidence that the English-only movement is about more than just language policy. U.S. English, the chief force behind the English-only movement, has long been linked to anti-immigrant groups.[25] John Tanton, one of the founders of U.S. English, referred in a 1986 memo to the high birthrate and low educational levels of Hispanic immigrants and posed the question: "As whites see their power and control over their lives declining, will they simply go quietly into the night? Or will there be an explosion?"[26] The ELA must not, therefore, be viewed in isolation, but as part of a broad-based agenda that combines both linguistic and nonlinguistic objectives, both legitimate and suspect goals.

III. Judicial and Statutory Protection of Language Minority Rights

During the last three decades, both Congress and the federal courts have responded to the needs of Americans with limited English proficiency. In the use of court interpreters for non-English-speaking criminal defendants, the courts took the lead. The Second Circuit held that the sixth and fourteenth amendments to the U.S. Constitution require a court to inform a criminal defendant of "his right to have a competent translator assist him, at state expense if need be, throughout his trial."[27] Congress then subsequently codified this ruling by passing the Court Interpreters Act.[28] The Act requires the Director of the Administrative Office of the United States Courts to establish a program for the use of interpreters in all civil or criminal litigation initiated by the United States in a U.S. district court.

Notably absent from the statements of many English-only advocates, however, is any support for English remedial and education programs to fill the void left by the programs they would eliminate.

In most areas, however, the impetus has come from Congress, which has enacted specific legislation for the benefit of Americans not yet proficient in English. The two most important areas of congressional intervention have been voting rights and bilingual education. The Supreme Court has interpreted the Civil Rights Act of 1964[29] to require certain bilingual education assistance to non-English-speaking students.[30]

In 1965, Congress passed the Voting Rights Act[31] to eliminate literacy tests and other discriminatory "tests and devices" that effectively disenfranchised blacks in the South. The statute also incorporated a provision that recognized the need for language assistance for non-English speaking persons. This provision, section 4(e), barred language discrimination at the polls for literate Spanish-speaking Puerto Rican voters who emigrate to the mainland.[32] In *Katzenbach v. Morgan*, the Supreme Court upheld section 4(e) as a valid exercise of Congress's power to enforce the fourteenth amendment.[33] Writing for the majority, Justice Douglas expressed skepticism that denying the franchise was a legitimate means of promoting the learning of English:

> We are told that New York's literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English language and in order to assure the intelligent exercise of the franchise. Yet Congress might well have questioned, in light of the many exemptions provided, and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement, whether these were actually the interests being served. Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise."[34]

In enacting section 4(e), Congress declared only that the states could not condition the right to vote on English proficiency. It did not explicitly require states to provide multilingual ballots. Nonetheless, the courts have recognized that without the ability to understand the ballot, the right to vote is hollow. As the Seventh Circuit found in *Puerto Rican Organization for Political Action v. Kusper*, the right to vote includes "the right to be informed as to which mark on the ballot, or lever on the voting machine, will effectuate the voter's political choice."[35] Similarly, in *Arroyo v. Tucker*, the court stated that "'the right to vote' means more than the mechanics of marking a ballot or pulling a lever."[36] Non-English-speaking persons cannot cast an effective vote "without . . . [the] ability to comprehend the registration and election forms and the ballot itself." For this reason, these courts have construed section 4(e) to require multilingual materials and assistance for voters unable to understand English.

By 1975, Congress had found that "language minority citizens [continue to be] excluded from the electoral process through the use of English-only elections."[37] To combat this discrimination, it amended the Voting Rights Act to require distribution of bilingual voting materials and ballots in any jurisdiction where more than five percent of the citizens of voting age were members of a single language minority, and the percentage of such persons who had not completed the fifth primary grade was higher than the national rate.[38]

Congress and the federal courts have also recognized the need for language assistance in the public schools to provide equal educational opportunities for students with deficient English skills. In response to warnings that such students placed in English-only classrooms were falling behind academically and were lacking self-esteem,[39] Congress, in 1967, passed the Bilingual Education Act.[40] The Act offers financial assistance for local bilingual education projects designed to meet the special educational needs of children who speak English poorly or not at all.

In addition, the Supreme Court has held in *Lau v. Nichols*,[41] that placing non-English-speaking students in English-only classrooms constitutes discrimination in violation of Title VI of the Civil Rights Act of 1964.[42] As the Court stated, "[t]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."[43] Congress subsequently codified the Court's holding in section 1703(f) of the Equal Education Opportunities Act of 1974, requiring a school district to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[44]

IV. The English Language Amendment

An English Language Amendment was first introduced in Congress in 1981 by Senator S. I. Hayakawa, and has been reintroduced in each succeeding Congress. In the 100th Congress, five House Joint Resolutions[45] and one Senate Joint Resolution[46] were introduced.[47] Three of these resolutions are official-English versions. They declare that English is the official language of the United States but leave it to Congress to decide how to accomplish this purpose by appropriate legislation. The other three resolutions are more accurately described as English-only versions of the amendment. They go beyond declaring English the official language and invalidate any governmental program or policy requiring the use of a language other than English. Some of the English-only versions provide for narrow exceptions to this general prohibition.

The assumptions behind the official-English versions of the amendment are twofold: first, that the role of English in our society is being eroded by the number of Americans speaking other languages, particularly Spanish; and second, that giving English a constitutional status will somehow halt this erosion. The first assumption is baseless. Since our national inception, English has coexisted alongside a variety of minority languages, none of which threatened to displace English as our predominant language. The fact that many Americans today are bilingual is a source of national strength and not evidence that the role of English is diminishing.

The second assumption, that an official-English declaration in our Constitution will in any way affect the status of English in our society, is also unfounded.[48] Providing English with an official status would merely ratify the fact that English is overwhelmingly the predominant language in the United States. While a working knowledge of English is certainly a prerequisite to meaningful participation in American society, a constitutional declaration accomplishes nothing to promote the learning of English. An immigrant with little or no English proficiency will be no more persuaded of his need to learn English because that is our official language under the Constitution.

Declaring English to be our official language, therefore, would amount to nothing more than a symbolic gesture. Notwithstanding the importance of national symbols, this is no justification for amending the Constitution. The founders deliberately made the amendment process difficult and long, requiring a two-thirds majority of both houses of Congress and approval by three-fourths of the state legislatures.[49] Alternatively, two-thirds of the state legislatures can call a constitutional convention, which must then approve amendments by a vote of three-fourths of the convention. The purpose of these procedural hurdles is, in part, to discourage insubstantial amendments, such as an official-English declaration, which have the effect of undermining the integrity and coherence of the Constitution.

In contrast to the official-English versions of the amendment, the English-only versions would do much more than make a symbolic statement. If approved, an English-only amendment would invalidate any state or federal"law, ordinance, regulation, order, decree, program, or policy" which requires the use in the United States of any language other than English. This provision would eliminate--across the board--each of the statutory rights and programs created over the past three decades for non-English-speaking Americans. Bilingual voting ballots and materials would henceforth be presumptively unconstitutional, as would most bilingual education programs. The provision of interpreters in court proceedings would also be barred by the amendment to the extent that these are not constitutionally mandated.[50] In addition to these federal programs, a multitude of less obvious state and local[51] language initiatives might also conflict with an English-only amendment. These include 911 emergency services, requiring foreign language books in public libraries, and multilingual assistance in completing tax forms.

Besides gutting existing federal and state language assistance programs, the English-only amendment would also cripple all governmental efforts to fashion workable and fair language policies for the future.To a large extent, whether the government should provide language assistance for non-English-speaking persons is a public policy judgment. Where a fundamental right such as voting is implicated, there should be a strong presumption in favor of language assistance.[52] In the case of other government programs, consideration should be given to a variety of factors, such as the importance of the service to non-English-speaking persons, the number of such persons denied access to the service without language assistance, and the cost of providing the service in a language other than English. Because these factors can vary from program to program, the issue is best resolved on a flexible basis. Neither the Congress nor the states should be barred from requiring language assistance, as the English-only amendment would do, where the competing factors clearly weigh in favor of such assistance.

Largely in response to criticisms that an English-only amendment would be overly disruptive, Representative Norman Shumway of California introduced a modified version of the ELA (H.J. Res. 656) at the end of the 100th Congress, providing for certain exceptions to the English-only rule. These exceptions include"any law, ordinance, . . . (1) to provide educational instruction in a language other than English for the purpose of making students who use a language other than English proficient in English; (2) to teach a foreign language to students who are already proficient in English; (3) to protect public health and safety; or (4) to allow translators for litigants, defendants, or witnesses in court cases."

Conspicuously absent from this list is any mention of voting, arguably the area where language assistance is most crucial. The exception for bilingual education programs has apparently been included so as not to conflict with judicial decisions which have construed certain federal statutes to require affirmative language assistance to non-English-speaking students.[53] While the amendment's exception may be consistent with these authorities, its scope appears much more narrow in practice. Instruction in subjects such as history and science in languages other than English designed to prevent students with limited English skills from falling irretrievably behind their fellow students, might be forbidden as outside the range of this exception. This would produce the perverse result that these students would be deprived of the knowledge and concepts basic to American citizenship. Moreover, distinguishing permissible from impermissible uses of bilingual education would require an inquiry into underlying purpose, which may not be easily ascertained from the face of the statute or program.

Although these exceptions do mitigate some of the harshest effects of the proposed amendment, they cannot correct the amendment's most basic flaw of using the Constitution to regulate language policy. The Founding Fathers rightly rejected a language provision as both unnecessary and extraneous to the Constitution's purpose of creating permanent governmental institutions and protecting fundamental rights. They correctly perceived that an official language law would most likely be divisive in its effects and discriminatory in its application. The ELA should be rejected for the same reasons.

Besides gutting existing federal and state language assistance programs, the English-only amendment would also cripple all governmental efforts to fashion workable and fair language policies for the future.

CHAPTER XIX

MINORITY BUSINESS DEVELOPMENT AND EQUAL EMPLOYMENT OPPORTUNITY IN THE TELECOMMUNICATIONS INDUSTRY

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I. Introduction

Between the turn of the century and 1988, America transformed itself from a society that communicated by written word into a society that communicates by broadcast word and picture. Public discourse, news, politics, social reality--the very images of ourselves--all are fashioned and reflected by the broadcast media, especially television. Our traditions of freedom of the press and freedom of speech worked well when most people could afford access to the public forum. Today, when minutes of airtime can cost millions of dollars, and when a handful of people at a few networks shape television programming, how can we insure that all voices are heard?

Congress recognized this problem in framing the Federal Communications Act of 1934. The Act created the Federal Communications Commission (the FCC or the Commission) and charged it with responsibility for diversifying control of the burgeoning broadcast industry. Radio and television broadcast spectrum were declared a limited and valuable national resource, and the FCC was required to distribute control of the air waves according to the public convenience, interest, and necessity. Broadcast licensees were held responsible for assessing and meeting the needs of their listening public.

In the late 1960s, the FCC began to acknowledge that minorities and women had long been underrepresented or misrepresented by the mostly white, male-owned and -dominated broadcast media. In order to ensure true diversity of programming, and to improve minority and female access to the air waves, the FCC developed policies to promote minority and female ownership of broadcast properties and to ensure equal employment opportunity (EEO) by broadcast license holders. The EEO effort has taken the form of FCC rules and policies that require licensees not to discriminate, to report employment statistics, and to implement affirmative action programs. The FCC may impose a number of sanctions, including denial of license, on broadcast licensees that fail to adhere to the EEO rules and policies.

By the late 1970's, the FCC adopted three policies to increase minority ownership of broadcast properties. First, the distress sale policy allows broadcasters in danger of losing their licenses to sell their stations to minority-owned businesses for up to 75 percent of the station's fair market value. Second, the comparative preference policy awards enhanced credit to minority-or female-owned businesses that are competing for a license with other equally qualified businesses. Third, the tax certificate policy grants certain tax advantages to broadcast owners that sell their stations to minority- owned businesses. Together, these three policies have increased the number of minority-owned broadcast properties from fewer than fifty to about three hundred, from less than one percent of all broadcast properties to over two percent.

During eight years under the Reagan administration, the FCC's commitment to EEO and minority business development policies has been ambivalent at best. Lack of EEO enforcement coupled with a laissez-faire attitude toward enforcement of other rules governing licensee responsibilities, has led to fewer license hearings and consequently to fewer opportunities for distress sales or comparative liscense renewal hearings.

During the late 1980's, the most serious threat to achieving the goals of diversity and equal opportunity has been the current Commission's apparent willingness to forsake its minority-ownership policies. In late 1986, the FCC reacted to a court challenge to the constitutionality of its comparative preference policy by suspending distress sales and comparative hearing preferences. In response to this action, Congress, by means of riders attached to appropriations bills, has required the FCC to reinstate its policies. However, because the FCC's suspension was part of a coordinated and wide-ranging attack on affirmative action by the Reagan Justice Department, a permanent resolution to this crisis requires more substantive congressional action.

In the early 1980s, the FCC applied minority ownership incentives to other areas, including the allocation of virgin or expanded broadcast spectrum. However, in 1985 the minority preference policy in the "AM Clear Channel" was eliminated out of an overriding allegiance to a free-market philosophy. The FCC ruled that changed market dynamics had made minority preferences unnecessary. During the same period, the Commission also refused to incorporate minority ownership preferences in "Foreign Clear Channel" proceedings. Again, the Commission acted to support free-market economic initiatives at the expense of diversity.

Finally, the FCC implemented random lotteries to distribute licenses as a means of avoiding the expense and delay caused by comparative licensing hearings. Despite a strong congressional mandate, the Commission resisted establishing minority preferences in the lotteries. Only after continued congressional pressure did the FCC implement a lottery scheme that recognized minority preferences.

Other areas of concern to minority and women broadcasters such as discrimination in advertising by corporate sponsors and difficulty in obtaining sufficient start up financing, have been addressed intermitently by the Commission. However, the Commission's "*de minimis*" actions in these areas have not resulted in significant progress toward broader financial support for minority and female broadcasters.

This paper analyzes separately the FCC's EEO rules and policies (§II), the distress sale policy (§III), spectrum allocation issues (§IV), business practices affecting FCC license applicants (§V) the tax certificate policy (§VI), and the comparative preference policy (§VII). Specific recommendations appear at the end of each section.

II. Equal Employment Opportunity

A. Development of the Commission's EEO Policy

For the most part, the FCC developed its EEO policies internally, through a series of rulemakings and policy statements. With the exception of special EEO rules applicable to cable licensees,[1] Congress has not imposed EEO requirements on FCC licensees, and has left such matters to the discretion of the Commission. In addition to FCC proceedings in this area, federal court decisions have influenced important turns in the development of the Commission's EEO policy.

The Communications Act of 1934[2], empowers the Commission to grant, continue, and renew broadcast licenses based upon the public convenience, interest, and necessity.[3] In 1968, with the adoption of *Nondiscrimination in Employment Practices of Broadcast Licensees*[4] (the "1968 Policy Statement"), the Commission began to use its power to promote nondiscriminatory employment practices among its broadcast licensees. The FCC recognized a broadcast licensee as a "public trustee"[5] who "seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; [and who] is burdened by enforceable public obligations. . . .[6]

Due to a sense of urgency raised by the Kerner Commission's report on the "serious racial crisis"[7] facing the nation[8] the FCC mailed Chapter 15 to every broadcast station licensee.[9] That chapter noted the potential influence the media could have in tackling racial discord in the country:

> ... the media have not communicated to the majority of their audience--which is white--[the] sense of the degradation, misery, and hopelessness [which results from] living in the ghetto. They have not communicated to whites a feeling for the difficulties and

> frustrations of being a Negro in the United States. They have not shown understanding or appreciation of--and thus have not communicated--a sense of Negro culture, thought or history.[10]

With respect to the media the Kerner Commission concluded that employment of a greater number of blacks in media was required, both behind and in front of the cameras and in decision-making editorial positions, to "establish an effective link to Negro actions and ideas and to meet legitimate employment expectations."[11]

In adopting its 1968 Policy Statement, the Commission considered and declined to adopt a proposed rule to prohibit the grant of a broadcast license to any station that engaged in discriminatory employment practices, and, pleading lack of staff and resources to require stations to submit annual reports of compliance with the Commission's nondiscrimination policy.[12] The Commission did so, even though the Department of Justice concluded that the FCC had the authority to adopt such policies.[13]

Instead, the 1968 Policy Statement provided that a petition or complaint which raised substantial issues of fact regarding a licensee's discriminatory employment practices would trigger full investigation of the charges and possible withholding of the license. Although the Commission planned to carefully examine any "complaints raising substantial questions" of discrimination at a particular station, it noted, however, that purely statistical information, by itself, would not raise a substantial question of discrimination in particular cases, nor would it ordinarily institute a proceeding solely on that basis.[14] The Commission stated that it expected "broadcast licensees--as public trustees--generally to comply with this established National policy,"[15] and called for "a commitment going beyond the letter of the policy and attuned to its spirit and the demands of the times."[16]

In 1969, the Commission adopted rules prohibiting discrimination and calling upon broadcast licensees to review their employment policies and practices.[17] In 1970 those rules were strengthened to require stations employing five or more people to submit a written EEO program at the time of renewal application, and annual statistical reports of the racial composition of their work force.[18] The Commission also included women in its EEO efforts.[19]

In 1972, the Commission established a mechanism to review licensee's which employed no women or minorities, or to determine if the numbers of such employees had declined.[20] By 1974, the Commission concluded that "employment neutrality" was insufficient to remedy the underemployment of minorities and women and that affirmative action was necessary.[21] Accordingly, it required licensees to engage in reasonable and good faith efforts to recruit and employ minorities and women.[22]

In evaluating a licensee's EEO record, neither the courts nor the Commission require licensees to achieve 100 percent parity, that is, percentages of minority and women employees that correspond precisely to the percentages of minorities and women in the local labor force.[23] Rather, licensees are encouraged to maintain minority and female employment levels within a prescribed "zone of reasonableness," a concept that originated in *Stone v. FCC*.[24] Licensees are required to report the race and sex of employees in each of nine job categories.[25] The upper-four job categories--(1) officials and managers; (2) professionals; (3) technicians; and (4) sales workers--supposedly reflect decision-making positions, although they comprise 87 percent of all broadcast employees. In 1977, the Commission defined the "zone of reasonableness" as 50 percent of parity overall and 25 percent of parity in the upper-four job categories.[26] In 1980 the "zone" for the upper-four categories was raised to 50 percent of parity for most licensees.[27]

However, the "zone of reasonableness" is not a strict standard with which licensees must comply; employment statistics outside the "zone" are merely a "red flag"[28] that triggers further scrutiny of the licensee's employment practices. According to present policy, if the licensee's employment of minorities or women is not within the "zone of reasonableness," and that licensee lacks an acceptable affirmative action program, then the Commission may order a hearing to review the license. However, as discussed in Part C., *infra*, the Commission has rarely ordered hearings on EEO grounds.

Moreover, the "zone of reasonableness" was established to be a dynamic concept which progressed closer to parity as licensees implemented antidiscrimination rules and policy.[29] However, the FCC has not raised the "zone" in eight years and, as discussed in Part C, *infra*, it apparently has become a comfortable resting place, rather than a steadily increasing goal, for the Commission and many licensees.

Network and licensee headquarter staff are not subject to the Commission's EEO policies and review, even though both can be presumed to have a higher concentration of decision-making employees than broadcast stations. The exclusion of network and headquarters staff from EEO requirements persists despite the Commission's acknowledgement that the networks control programming creation and selection[30] and thus programming diversity. Moreover, by exempting networks and headquarters, the Commission continues to ignore a significant number of broadcast industry employees. For example, in the metropolitan New York area, in 1985, fewer than 3,000 employees work for the various television stations, compared with 12,000 employees who work for the three major network headquarters.[32] The networks generally have substantially worse EEO records than do broadcast licensees, and there is evidence that some licensees are able to manipulate their employment profiles by, for example, categorizing white males as network employees rather than as affiliated-station employees.[60] In 1979, a group of citizens' organizations petitioned the FCC to extend its employment practices and reporting rules to the networks and headquarters. After six years, the FCC denied the petition without comment on the merits.[33]

FCC policies have proven effective in promoting equal employment opportunities for women and minority broadcast licensees. Although some of the improvement since 1972 probably is attributable to general demographic changes, and might have occurred without the FCC's efforts, a large part of the increased employment of women and minorities can be attributed to the FCC's antidiscrimination and affirmative action rules.

It is also clear that women have benefited the most from those policies.For example, during the period from 1972 to 1987, the percentage of women employed full-time increased from 23 percent to 37.8 percent. And the percentage of women employed in the upper-four job categories increased from 9.7 to 29 percent.

Employment opportunities also improved for minorities. Minority full-time employees increased from 9.9 to 16.2 percent, and minorities employed in the upper-four job categories increased from 8.4 to 14 percent.

Thus, by 1987, the national average for broadcast licensees was 84 percent of parity for women and 78 percent of parity for minorities.

C. Enforcement of the FCC's Broadcast EEO Rules

A broadcast licensee's EEO performance receives closest scrutiny when its license comes up for renewal, which is every five years for television and every seven years for radio stations. At that time, the Commission reviews the licensee's performance during the expiring-license term to determine whether it has operated the station in the public interest and complied with FCC regulations,[34] including those which prohibit discriminatory employment practices and require aggressive affirmative action. When there is a substantial and material question of fact about a licensee's compliance with FCC regulations, or when the Commission is unable to find that grant of a license will serve the public interest, the Commission must designate the renewal application for a full evidentiary hearing, which may result in sanctions.[35]

In designating a renewal application for hearing, the Commission rarely acts on its own initiative, but rather responds to informal objections or "petitions to deny" the license filed by citizens or groups.[36] Groups such as the National Black Media Coalition, Inc. (NBMC) or the Office of Communication of the United Church of Christ (UCC) often file petitions representing minorities. In fact, since 1981, objections by citizens' groups initiated each of the four renewal applications that, in the Commission-view, were designated for hearing on EEO grounds.[37]

The Commission is supposed to investigate the basis for petitions to deny to challenge license renewals on EEO grounds.[38] However, the Commission seldom investigates the basis for such challenges. If the FCC does investigate and concludes that the acts complained of, if true, would warrant sanctions and that a substantial and material question of fact has been raised by the challenge, the Commission designates the renewal application for a full evidentiary hearing which may result in the imposition of sanctions.

Denial of license renewal is the ultimate sanction. The Commission more commonly responds to inadequate EEO efforts with lesser penalties, such as sending a letter of admonishment, imposing additional reporting requirements, requiring the licensees to submit hiring goals and timetables, or renewing the license for less than the full term. Since 1975, 418 broadcast licenses have been granted subject to increased EEO reporting requirements, with 34 of those granted only as short-term renewals and 44 licensees required to submit hiring goals.[39] Between 1972 and 1987, the Commission designated only 11 licensees (representing 23 broadcast stations) for hearings on grounds of EEO deficiencies; only 3 of those licenses were denied on EEO grounds.[40]

By comparison, in 1984, Congress established EEO guidelines for cable systems,[41] which require the FCC to annually certify each cable operator's compliance.[42] Annual certification appears to have had a salutary effect. In 1986, the Commission denied compliance certificates to more than ninety cable employment units and admonished some 341 units to improve their EEO efforts.[43] Annual certification of broadcast licensees' of compliance with EEO requirements might well improve the FCC's enforcement record in this area.

Commission decisions are appealable to the United States Court of Appeals for the District of Columbia Circuit, which is empowered to review such decisions only for abuse of discretion. The Court generally defers to the expertise and experience of the FCC, and will reverse it only if an action is arbitrary, capricious, or unreasonable.[44] Despite that high standard of proof, Commission decisions regarding licensees' EEO records have been successfully challenged.

In *Black Broadcasting Coalition of Richmond v. FCC*,[45] the Court reversed the Commission's decision not to designate a license for hearing. Despite credible allegations of racial discrimination, work force statistics outside the "zone of reasonableness," and a serious question as to the adequacy of the licensee's affirmative action program, the Commission had renewed the license without a hearing. The court stated that:

> It did not require much analysis for the Commission to perceive that the situation highlighted by [the appellant's] opposition called for a 'hard look' and for prompt decisive action in the public interest. But the Commission delayed for three years and then looked only to post-license-term statistics and ignored term-time performance which, as measured by the licensee's reports to the Commission, was clearly outside the 'zone of reasonableness.' . . .[46]
>
> If the 'curious neutrality-in-favor-of-the-licensee' which this court has previously noted, *Office of Communication of United Church of Christ v. FCC*, 138 U.S. App. D.C. 112, 425 F.2d 543, 547 (1969), is to end, there must be a more meaningful accounting for conduct during the contested license period and more exacting standards established for the future.[47]

Two recent court decisions are worth noting. In *National Black Media Coalition v. FCC*,[48] NBMC had filed a "petition to deny" renewal of the license based on the licensee's poor EEO performance during the license term. The Commission denied the petition and awarded a full-term license because of the licensee's improved post-term EEO performance. On appeal, the court admonished the Commission for departing from clear precedent by considering post-term improvements in a licensee's EEO record and described the Commission's decision as "devoid of reasoning and analysis."[49] The Court remanded the case, stating that:

> the agency must provide sufficient explanation to ensure us that its new train of thought is not arbitrary, and is not the product of impermissible considerations. . . For example, an agency may not repudiate precedent simply to conform with a shifting political mood.[50]

More recently, in *Beaumont Branch, NAACP v. FCC*,[51] the Court remanded to the Commission because it had failed to determine: (1) why black employment dropped dramatically and remained very low after the licensee acquired the station; (2) why the licensee contradicted itself in its statements to the FCC regarding the reasons for the departures of several black employees; and (3) why the licensee failed to maintain adequate affirmative action programs.[52] In remanding the case, the court stated that "(t)he Commission acted unreasonably when it pronounced itself satisfied on these points based entirely on the licensee's sketchy and sometimes contradictory explanations."[53]

Of course, there are additional cases in which the appeals court overturned or criticized FCC decisions on EEO issues,[54] or in which a dissenting judge objected to the Commission's handling of its EEO enforcement responsibilities.[55] Individual Commissioners have, at times, dissented from or criticized FCC actions regarding EEO enforcement, calling on the Commission to set new standards[56] or toughen enforcement.[57]

Since 1968, the Commission has been reluctant to prescribe measures to force broadcasters to achieve equal employment. Indeed, from the beginning, the Commission has been uncomfortable with statistical measures and numerical goals. That discomfort continues to this day, and distaste for specific requirements for strong enforcement of nondiscrimination rules has found new expression in the current Commission. The Chairman of the FCC, Dennis Patrick, stated the issue as follows:

> A focus upon efforts, not results, is . . . compelled by sound policy considerations. Numerical quotas encourage employment decisions *solely* based upon race or sex. In a word, quotas encourage discrimination--the very conduct the Cable Act and our EEO broadcasting regulations seek to eradicate. Equally distressing, however, is the fact that numerical quotas can be used as a 'safe harbor' by those who achieve the numerical goal and, thereafter, lessen or stop altogether affirmative action efforts. There is nothing magic, for example, about our traditional guideline of 50 percent of parity. It is not our intent . . . that companies whose employment profiles exceed 50 percent of parity be able to cease EEO efforts.[58]

Patrick's statement is misleading on several counts. To say that quotas encourage discrimination wrongly equates prescribing and enforcing a "zone of reasonableness" amounts to a strict numerical quota, as discussed above. Employment statistics outside the "zone" serve only as a "red flag" to alert the FCC of the need for close scrutiny of the licensee's employment practices. No license has ever been threatened, much less lost, solely on the basis of employment statistics outside the "zone of reasonableness.")[59]

In addition, for Chairman Patrick to oppose numerical *goals* because of professed concern that stations might relax their affirmative action efforts upon reaching those goals is disingenuous in light of the FCC's less-than-enthusiastic enforcement of EEO regulations against stations whose employment of women and minorities is well below 50 percent of parity and the large number of stations who have failed to move beyond compliance with 50 percent of parity. The Commission should set and require stations to take action to attain ambitious goals, rather than setting no goal at all, and then worry that stations are resting on their laurels. After all, the current goal of employing women and minorities at 50 percent of parity means half representation and half diversity; full representation and full diversity must be the goal.

D. Recommendations

1. The Commission should vigorously enforce current EEO rules and apply more meaningful sanctions for noncompliance. The burden imposed by reporting requirements is not a penalty severe enough to dissuade many licensees from ignoring EEO rules. The possible loss of a license should be made credible by regularly designating licenses for hearings on EEO grounds. In addition, the FCC should rescind its policy of relying on underfunded private groups to police a licensee's EEO record.

2. The Commission should annually certify broadcast licensees' EEO records. It is not sufficient that broadcast licensees' EEO compliance be reviewed only at renewal time every five or seven years, and then usually only if a citizens' group files a petition which raises EEO issues.

3. The Commission should impose its broadcast EEO requirements on networks and licensee headquarters in order to increase diversity among programming decision makers.

4. The Commission should revise the definition of the "upper-four" job categories which are supposed to represent the top decision-making positions. At present, the upper-four categories comprise about 87 percent of all broadcast employees.[60] As Judge Robinson aptly noted in his dissenting opinion in *Bilingual Bicultural Coalition v. FCC*,[61] such statistics "reflect....a distorted view of what jobs are important, making a mockery of any figures purporting to show that a licensee has an appreciable number of women or minority-group members in critical positions." The Commission should require licensees to submit salary information and job descriptions to accompany categorization of employees, thus providing an indication of the true decision-making importance of any job.

5. The Commission should require broadcast licensees to achieve clear numerical employment goals and move towards 100 percent parity on a scheduled basis. Experience shows that licensees can more than meet goals when given the incentive. Broadcasters have achieved approximately 78 and 84 percent of parity which represents a significant improvement in minority and female employment, respectively, since 1974, the year the FCC began enforcing EEO requirements.

III. Distress Sales

A. Development of the Distress Sale Policy

In the late 1970s, the FCC acknowledged that despite incremental gains from its EEO and community interest ascertainment policies, the interests of racial minorities continued to be under represented in the broadcast media.[62] To resolve this dilemma, the Commission instituted policies to increase minority ownership opportunities.[63] The definition of "minority owner" includes limited partnerships where the minority general partner, or partners, own more than 20 percent equity interest in the broadcasting entity, and exercise managerial control. Previously, applicants had to be more than 50 percent minority-owned to qualify as a "minority".[64] In May 1978, the Commission initiated one such policy--distress sales to minorities.

Distress sales permit a broadcast licensee, whose license has been designated for a revocation or renewal hearing, to transfer or assign the license to a qualified minority applicant at a "distress sale," that is, a discounted or lower than fair-market-value (FMV) price.[65]

To prevent belated efforts to assign the license after an adverse determination appears likely, a licensee must generally engage in a distress sale before the hearing process has begun.[66]

The public benefits from the distress sale policy because broadcasters with questionable operating credentials are replaced by qualified newcomers that represent a different segment of the population and because the Commission is relieved of the burden of proceeding with a long and extensive enforcement hearing.[67] The policy also gives broadcasters a way to avoid both the enormous expense of a renewal or revocation hearing, and the possibility of an unfavorable decision resulting in license revocation the loss of the license.[68]

During the 1980s, FCC cases guidelines for setting the price of a station sold pursuant to a distress sale. Generally, licensees cannot sell distressed stations to qualified minorities at a price greater than 75 percent of the average appraised fair market value.[69] In *Grayson Enterprises, Inc.*[70], a case in which a renewal hearing on fraud, misrepresentation, and improper operations, was stayed to allow the licensee to conduct a distress sale, the Commission ruled the distress sale price could not exceed 75% of average assessed FMV. In this case, the licensee was charged with undermining the distress sale policy by submitting a minority purchase offer that exceeded 75% of appraised FMV.[71]

B. Application of the Distress Sales Policy

Despite the tremendous enthusiasm which accompanied the the distress new sale policy in 1978, the number of distress sales approved by the FCC has dropped markedly in recent years. From 1978 to 1981, the Commission approved twenty-seven distress sales to minority owners.[72] From 1982 to 1987, only ten distress sales to minority owners were approved.[73] Approval for those ten transactions took place during the years 1984 through 1986. No distress sales were approved during 1982 and 1983 or 1987 and 1988.[73] Underlying this significant decline is a regulatory philosophy that makes it less likely for the Commission to order a revocation proceeding or to designate a renewal application for hearing, thereby placing an existing license in distress.[75] The Commission's failure to apply sanctions for rule violations has resulted in a predictable decrease in license revocation or renewal hearings and, thus, a parallel decline in opportunities for distress sales. Additionally, in three major cases, the Commission has waived its rules to allow licensees to sell broadcast properties at nondistress sales despite unfavorable decisions from prior renewal or revocation hearings. In *George E. Cameron, Jr. Communications*[76], the Commission allowed a licensee who had been disqualified *after a renewal hearing* to transfer the license to a party who had previously owned a 49 percent interest in the disqualified licensee. The Commission's written decision approving the transfer did not mention the possibility of conducting a distress sale. In *Spanish International Communications Corp.*[77],the Commission allowed SICC, ***a licensee who had been disqualified in a prior renewal hearing***, to transfer its license at fair market value to nonminority buyers. In declining to require a distress sale, the Commission cited the following factors: (1) the superior public interest concern in maintaining the special Spanish program format; (2) distress sales were not the exclusive exception to transfer policy; and (3) uncertainty concerning the constitutionality of minority ownership policies.[78] Finally, in *RKO General, Inc.*[79] the FCC approved RKO's transfer of a license to a nonminority entity even though it had been disqualified as a licensee.[80] The Commission concluded that the transfer served the public interest because it terminated proceedings that had "dragged on" for twenty-three years.

C. Recommendations

1. Require annual reports on enforcement of the distress sale policy to minorities, including a summary of all cases designated for revocation or renewal proceedings and the disposition of those cases.

2. The FCC should revise and codify distress sale price criteria. Presently, distress sale prices are set at between 50-75 percent of fair market value. The FCC should revise that policy to permit a qualified minority to purchase a station: (1) at 75 percent of the average appraised FMV *before commencement* of a revocation or renewal hearing; (2) at 50 percent of the average appraised FMV *after commencement* of a renewal or revocation hearing ***but before the initial Administrative Law Judge (ALJ) decision***; and (3) at 25 percent of the average appraised FMV after an initial ALJ decision but before a final Commission ruling.[81]

3. In response to the 1989 *Shurberg* decision, Congress should legislate and require the FCC to codify the distress sale policy established during the 1980's (see discussion n. 81).

IV. Spectrum Allocation

A. Introduction

The electromagnetic spectrum[82] is the natural resource that makes modern communications and communications development possible. The part of the electromagnetic spectrum that has a frequency range from 30Hz to 300GHz is called the radio spectrum. The radio spectrum is divided into bands of varying frequencies each of which produces optimal results for a certain use, such as radio broadcasting, television broadcasting, or mobile or satellite communications.[83]

The spectrum is a limited natural resource because technology restricts the ability to use it efficiently. As technology extends the usable spectrum, the FCC allocates it for various communication applications.[84] Due to the limited usable spectrum, allocation policies are an important parameter that define the number of available licenses for a particular communication service. Thus, it is important that minority ownership policies be applied to spectrum allocation proceedings; for it is less costly and more efficient to increase minority ownership opportunities by allocating virgin spectrum to new minority owners than by redistributing existing licenses from nonminority licensees through revocation or renewal proceedings.

During the 1980s, the FCC considered applying minority ownership policies during two proceedings to allocate expanded AM radio spectrum [540-1600KHz]. In both "AM clear channel" and "Foreign clear channel" proceedings, the FCC considered and eliminated minority ownership preferences. In keeping with its laissez-faire regulatory philosophy, the Commission concluded that market dynamics no longer justified the application of minority preferences to clear channel proceedings.

B. AM Clear Channel Proceedings

Since 1927, the Commission has pursued three basic goals in assigning radio broadcast stations frequencies on the spectrum. These are: (1) at least one service to every person; (2) service from as many diversified sources as possible; and (3) outlets for local self expression addressed to the particular needs and interests of each community.[85] Clear channel service, also known as wide-area service, provides one method of delivering at least one service to as many people as possible. Clear channels are made possible by assigning top priority to certain channel signals in the AM radio spectrum. Clear channels transmit with a higher signal strength, and in all directions. Additionally, clear channels receive absolute protection against interference from any other multiple service or local radio operations.[86] This interference protection precludes further use of that part of the spectrum, thus restricting the ability of other stations to provide radio service to local communities.[87]

In 1980, the Commission concluded that the public interest required adding new AM stations. Among the public interest objectives cited by the Commission was an *urgent* need for more minority-owned stations.[88] To accomplish that goal, the Commission decided to seek a better balance between clear channel service protection and increased AM radio service for local communities. As a result, approximately one hundred additional AM stations were created, which were previously unavailable due to the protections for AM clear channel station transmissions.[89] The Commission stated:

> Paramount among the competing needs [for spectrum space] which new stations can help to satisfy are, in our view, the need for more minority-owned stations, of which there are fewer than 200 among over 8000 AM and FM stations . . . we attach high importance to fostering the participation of heavily underrepresented minorities in the ownership and operation of broadcast stations. All *three branches of the Federal Government* have recognized this as *a major need.*[90]

In taking that action, the Commission reaffirmed important statutory and First Amendment objectives of ensuring an uninhibited marketplace of ideas through diversity of ownership in the broadcast industry.[91]

To implement its objective, the Commission, in 1980, adopted a minority preference factor among the application criteria for AM clear channels[92]. A "minority" applicant was defined as an ownership interest by blacks, Hispanics, American Indians, Alaskan natives, or Asian islanders greater than 50 percent.[93] However, race and ethnicity were only one among several factors affecting the decision to accept an AM clear channel application for filing.[94] Minority applicants were required to compete on a comparative basis with other applicants applying for the same station license.[95]

Five years later, in 1985, the Commission eliminated the minority preference for all future AM clear channel applications. Notwithstanding the beneficial effects to minorities from its preference policy, the Commission concluded that continuance of the preference no longer served the public interest.[96] The Commission also concluded that other minority preference policies, such as tax certificates and distress sales, sufficed to increase minority ownership.[97]

The record, however, suggests otherwise. The total number of broadcast stations owned by minorities actually declined during the 1980-1984 period from 196, or 1.9 percent of total broadcast stations in 1980, to 188, or 1.8 percent of total stations in 1984.[98] Moreover, it is clear that the AM clear channel minority preference policy was not given a sufficient opportunity to succeed. Of 115 new stations that were authorized under AM clear channel proceedings, only 13 were minority owned.[99]

C. Foreign Clear Channel Proceedings

In 1985, the Commission made available to qualified applicants 14 new foreign clear channels frequencies .[100] The Commission ruled that minority preferences were unnecessary in these proceedings because preliminary studies had indicated that the majority of the stations would occur in unserved or undeserved areas, and that opportunities to establish full-time stations on these channels would be limited. Thus, the Commission concluded that no appreciable gain in the number of stations owned by minorities would result from applying minority preference policies.[101]

The National Black Media Coalition (NBMC) challenged the basis of the FCC's conclusion that foreign clear channel proceedings provided limited opportunity for increasing minority ownership through minority preference policies. In *NBMC v. FCC*,[102] a federal appellate court admonished the Commission for its decision to exclude minority preference policies from the foreign clear channel proceedings on unpublished data. The Court held that the Commission's decision was arbitrary and capricious and remanded the issue for further consideration because the data had not been submitted to the public for comment. The data recently was submitted for public comment and NBMC has responded with its own study. Contrary to the Commission's study, NBMC's study indicates that twelve Foreign clear channels could potentially support full-time service of one or more stations to thirty-four sizeable communities, with a total population of approximately 4.7 million people, including 768,000 minorities. Indeed, the Commission's second study identifies eight additional service communities with approximately 1.1 million people, including approximately 106,000 minorities, that could be served by new Foreign clear channels. Thus, a total of forty-two communities with approximately 5.8 million people and 874,000 minorities could be served by the Foreign clear channels.[103] Thus, the alleged dearth of opportunity for minority ownership in Foreign clear channel proceedings cited by the Commission is not borne out by the facts. As a result, the Commission's rationale for excluding minority preferences appears unfounded.

V. Recommendations

The Commission should reinstate and strengthen minority preferences in spectrum allocation proceedings as follows:

(1) Conducting thorough studies of available service areas as a basis for determining whether to apply minority preferences to new or expanded spectrum allocations and submitting such studies to public comment and review before instituting spectrum allocation rulemaking proceedings.

(2) Adopting minority preferences where additional minority-owned broadcast stations could serve areas where diversified programming would reach new minority and nonminority listeners.

(3) Adopt NBMC recommendations to rapidly introduce new service while providing incentives to encourage minority applications.[104] for new spectrum allocation proceedings as follows:

(a) Allow any qualified person to identify a site and frequency and file the lead application (first-tier filing).

(b) For a limited period thereafter, only a minority, noncommercial, or experimental entity could file a mutually exclusive application (second-tier filing).

(c) If no minority or noncommercial applications were filed after the second-tier filing period, then any qualified applicants would be eligible to file a mutually exclusive application.

That procedure would encourage persons to file lead applications for new spectrum because they would be assured of competition only from minority or public-broadcast applicants during second-tier filing. Minorities would be encouraged to file during the second-tier for the same reason for example, less competition.

(4) Require annual reports on spectrum allocation proceedings, including the type of minority preferences implemented and the number of minority applicants awarded licenses as a result of those proceedings.

VI. Business Practices

A. Introduction

A major premise underlying the Commission's minority ownership policies is that institutional biases have effectively excluded minorities from ownership and limited the type of opportunities which are available. The FCC's minority ownership policies serve to alter these structural biases by stimulating private market-oriented initiatives among potential and existing licensees. Unfortunately, since 1982 the positive impact of these initiatives has been stymied by the Commission's sporadic enforcement of its minority preference policies. Despite policies to increase minority ownership through tax certificates and distress sales, the number of minority-owned stations continues to hover around 3 percent of all broadcast stations. Therefore, recommendations for future actions to increase minority ownership opportunity must focus not only on effective enforcement of the Commission's present policies, but also must include new policy initiatives to eliminate other business practices which limit opportunity for minority ownership. Those business practices include: (1) discrimination in placement of advertising; (2) difficulty in securing adequate financing for broadcast acquisitions; (3) inadequate prior experience in broadcast ownership or management; and (4) insufficient initiatives to stimulate minority ownership of nonbroadcast businesses regulated by the FCC, such as direct broadcast satellite and video datalink services.

B. Advertising Practices

Advertising is a principal source of revenue for television and radio broadcast stations. On average, 80 percent of advertising revenues are from local advertising with the remaining twenty percent coming from national and spot advertising.[105] In light of this business reality, prospective minority owners' application for a loan or plan for equity financing must be supported by an income statement that reflects the ability to increase advertising revenues. Discrimination in the amount and type of advertising on minority-owned media encumbers a prospective minority owner's ability to increase advertising revenues. As a result, the FCC's failure to implement policies to eliminate discriminatory advertising is an important obstacle to improving minority ownership opportunities.

In a February 1986 letter to the FCC, the National Black Media Coalition alleged that many advertisers and advertising agencies deliberately excluded advertising on minority-owned media despite the fact that minorities were major consumers of their products or services.[106] As an example, NBMC cited a radio station that experienced a 30 percent drop in advertising revenues once it became black-owned, even though it retained the same program format.[107] Another blatantly discriminatory example involved the refusal of a media buyer to purchase time on a radio station--rated number two in a large city--because of its ethnic program format.[108] Unbeknownst to the media buyer, the station was owned by another division of his parent company!

NBMC also alleged that many advertising agencies encourage separate budgets for advertising on minority-owned or -formatted radio stations which resulted in disparate allocation of advertising revenues.[109] For example, blacks account for about 13 percent of the population and about 10 percent of gross disposable income. In addition, Arbitron studies now show that more than 50 percent of blacks listen to black-formatted (R&B, Jazz, Urban contemporary) radio stations. Thus, black-formatted radio stations should receive no less than 5 percent of all advertising revenues. The actual percent of advertising revenues allocated to minority media is approximately 1 percent, which suggests that discriminatory placement of advertising has a negative impact on both minority-owned and -formatted stations, as well as on future ownership opportunities.[110]

These examples were also provided to the Federal Trade Commission ("FTC"). In April, 1987, the Federal Trade Commission responded that it lacked jurisdiction to remedy "discriminatory practices based on race, sex or other practices that [were] inequitable on general public policy grounds...."[111] The FTC's reply essentially stated that such practices were within the law, as long as they were based on rational economic analysis and were not perpetuated under some form of boycott or conspiracy. Because there was insufficient evidence of any illegal activity which injured consumers or competition, the FTC refused to investigate.

Given the FTC's action, responsibility for rectifying problems in this area belongs, in part, to the Commission. Though discriminatory advertising practices may not be per se illegal, such practices impede the ability of minority-owned and -formatted stations to attain major sources of revenue necessary to survive in broadcasting. Moreover, such practices undermine FCC minority ownership initiatives. This is especially true when advertisers refuse to do business with minority owners regardless of the underlying program format. Such a "Catch-22" can only be resolved through FCC rulemaking that addresses these practices. A Memorandum of Understanding between the FTC and FCC to share enforcement responsibility for these problems would be a positive first step. However, given the FCC's reluctance to take jurisdiction in this area, a Congressional investigation into such matters is probably the necessary first step.

C. Financing Practices

Another fundamental problem most prospective minority applicants encounter is the lack of adequate financing. A prospective owner of broadcast properties must evaluate and satisfy numerous factors in order to attract financing from private investors, venture capitalists, or other conventional lending sources. Generally these are: (1) assessing the station's worth through analysis of cash flow and comparable sales; (2) identifying the relevant market and competition for advertising dollars; (3) attracting or retaining competent management; (4) selecting the proper mix of target programming; (5) evaluating the technical transmission ability of the station; (6) assessing the stations ability to generate revenues that meet ongoing needs for operations, debt service, and profits; (7) assessing the impact of new competitive technologies on future market share.[112]

Once the prospective applicant completes that extensive effort, the last, often insurmountable, hurdle faced by prospective minority owners is the general perception among potential institutional investors that minorities lack sufficient competence to manage a business. To eradicate this perception, the Commission should take the initiative to stimulate institutional investors to provide financing to prospective minority owners. To that end, the Commission should: (1) subsidize the cost of providing experienced financial/technical advisors to assist prospective minority owners in developing business plans and funding for broadcast acquisition, construction and capital expenditures;[113], and (2) increase funding and improve the effectiveness of seminars designed to apprise financial institutions that do not specialize in broadcast financing of the nature of the industry and the techniques used to evaluate financing proposals. Such banks might make the modest, small business-type loans or investments sought by most minority broadcast companies.[114]

D. Enhancement of Financing Alternatives

Presently, multiple ownership rule allows one entity to have ownership interests in up to twelve TV, twelve FM and twelve AM stations.[115] Under an exception to this rule, an entity may have ownership interests in up to fourteen TV, fourteen FM, and fourteen AM stations if at least two of the stations in each service are at least 50 percent minority owned.[116] Though the exception has improved opportunities for minority-owned stations to attract equity investments, its overall effect on increasing the number of minority-owned stations has been limited. An exemption to the multiple ownership rules for financial institutions, private venture capital companies, investment banks, and minority Section 301(d) Small Business Investment Companies (SBICs) that invest and maintain noncontrolling interests in minority-owned stations would not only[117] promote diversity of ownership, but also would: (1) result in a larger pool of capital to finance prospective minority owners' acquisition of stations; and, (2) permit prospective owners to draw on the experience and expertise of minority venture capital groups and investors.

E. Nonbroadcast Initiatives

Policies to stimulate minority ownership of broadcast licenses have not been extended to licensing proceedings for nonbroadcast services. Diversity of programing, which is the fundamental premise of minority ownership initiatives in the broadcast industry, arguably is not applicable to nonbroadcast services. However, expanded minority ownership opportunities in nonbroadcast license services would assist minorities in gaining the ownership experience necessary to meet the criteria applied to broadcast license applicants.[118] The more experience a minority applicant can gain in areas analogous to broadcasting prior to applying for a broadcast license, the better he will be able to compete for the limited, available financial resources necessary to purchase a station. Moreover, on a comparative basis, analogous ownership experiences may allow a minority applicant to compete more effectively with the broadcast experience attained by other applicants.[119]

Further, technological developments make the traditional distinctions between broadcast and nonbroadcast services less relevant. Satellite, cable, and video datalink transmission services all provide a communication media through which some type of program format is provided to the public.[120] In sum, diversity of control in all telecommunications areas would enhance the efficacy of FCC initiatives to increase minority ownership in the broadcast media.

As we approach the 1990s, the Commission should recognize the synergies to be gained by aligning its minority ownership policies with the realities of new technologies which minimize the differences between nonbroadcast and broadcast services. Accordingly, the Commission should institute a rulemaking proceeding to expand its minority ownership initiatives to nonbroadcast services, and Congress should conduct hearings on minority ownership opportunities in the growing area of nonbroadcast technologies.

VII. Tax Certificates

A. Introduction

To promote minority ownership the Commission issues tax certificates pursuant to Section 1071 of the Internal Revenue Code. Tax certificates offer a valuable--and often overlooked--means of enhancing tax benefits in communications transactions, which may be enjoyed by all parties to the transaction. This has prompted increased interest in tax certificates. This section describes how the Commission's tax certificate policies are used to advance minority ownership of broadcasting and cable television properties. It concludes with specific recommendations for improving the tax certificate policy to enhance its effectiveness as means of promoting minority ownership.

Tax certificates are issued in two circumstances. First, when a broadcast or cable property is sold to a minority-owned or -controlled company, the Commission will consider granting a tax certificate to the seller which enables the seller (1) to defer payment of capital gains tax on the sale of the station or system provided that the seller reinvests the proceeds in "qualified replacement property" or (2) to reduce the basis of certain depreciable property remaining in the seller's hands. This can result in significant tax savings to the seller which, in turn, often reduces the purchase price for the minority buyer.

Second, minority entrepreneurs can use tax certificates to attract investors to a broadcast or cable venture because the FCC grants tax certificates to investors who provide "start-up" capital to minority companies. Those investors who purchase ownership interests in a minority company within the first year of its operation are eligible for a tax certificate upon the eventual sale of their interests in the company.

B. The Value of Tax Certificates

A simple illustration demonstrates the value of a tax certificate to the seller of a broadcast station. Assume that the seller of a broadcast station has a "basis" in the station of $1 million and sells the station for $2 million. By selling the station to a minority company, the seller can defer *all* tax otherwise due on the $1 million gain from the sale. On the other hand, if the sale does not qualify for tax certificate treatment, the IRS would assess taxes of at least $280,000. If the seller is a corporation subject to "double taxation," the aggregate tax liability would be over one-half million dollars:

Tax Certificate Benefits: An Example

Sale Price	$2,000,000
Basis for Gain or Loss	1,000,000
Gain	$1,000,000
Cash from Sale	$1,000,000
Tax Due (With Tax Certificate)	0[121]
Tax Due (Without Tax Certificate)	
Partnership or Subchapter S Corporation	$ 280,000[122]
Corporation (Corporate plus Individual Tax)	$ 524,800[123]

Perhaps the most dramatic and controversial example of the tax deferral benefits derived from the use of a tax certificate is the 1986 purchase of WTVT-TV, a CBS affiliate in Tampa, Florida. George N. Gillett, a white businessman who owns multiple broadcast stations, arranged financing of virtually all of the $365 million purchase price. Clarence V. McKee, a black lawyer, provided relatively little equity capital, but obtained 51.5 percent of the voting control and 20.1 percent of the equity. The Commission issued a tax certificate on this basis, and the seller deferred almost $100 million in capital gains tax. Mr. Gillett retained an option to buy out Mr. McKee after two years.

C. History of the Tax Certificate Policy

Congress enacted Section 1071 of the Internal Revenue Code (the IRC) in 1943 in response to the FCC's adoption, that same year, of the so-called "multiple ownership rules." These rules limit the number of stations that a single company may own in a single market and nationwide. Section 1071 was originally designed to lessen the hardship imposed on broadcasters who were forced to divest stations under the multiple ownership rules.

In the late 1970s, the FCC sought to create new opportunities for minority ownership in broadcasting. Several organizations, including the National Association of Broadcasters (NAB), the National Black Media Coalition, the National Telecommunications and Information Administration of the U.S. Department of Commerce, and the Congressional Black Caucus, met in 1977 under the auspices of the FCC to address this issue. In 1977, the NAB filed a petition for rulemaking urging the FCC to extend its tax certificate policy to promote minority ownership. The FCC adopted the policy in 1978. Since that time, it has issued over 160 tax certificates to encourage minority ownership.

Section 1071 empowers the FCC to certify that a sale or exchange of property "is necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations. . . ." This certification enables the taxpayer to defer tax on the gain if the proceeds are reinvested in qualified replacement property. Or, the taxpayer may elect to apply all or a portion of the gain to reduce the basis of depreciable property remaining in his hands immediately after the sale or exchange or acquired in the same taxable year.

Section 1071 is a unique provision because its implementation involves both the FCC and the IRS. The FCC first issues the tax certificate, but its use involves application of the IRS's rules on involuntary conversions and basis reductions. The FCC does not concern itself with how the taxpayer will use the tax certificate; the IRS does not second-guess the FCC's determination that the sale or exchange qualifies for tax certificate treatment.

D. Definition of a Minority-Controlled Company

To qualify under the policy, the minority company must demonstrate that it is minority-controlled.[124] Traditionally, the test with respect to corporate applicants was whether minorities owned more than 50 percent of the voting stock.[125] Recently, the Commission expanded the definition to permit limited partnerships with minority general partners to qualify, provided that the minority general partner owns at least 20 percent of the partnership's total equity.[126] In one recent case, the Commission found that a limited partnership with a corporate general partner qualified under the policy.[127]

The Commission looks beyond mere percentages of voting stock and partnership equity, however. It evaluates tax certificate requests on a case-by-case basis; applicants must be prepared to demonstrate that minorities control the entity, based on the totality of the circumstances. The Commission does not require minority owners to work in the day-to-day management of the broadcast station or the cable system acquired with the benefit of a tax certificate, but minorities must control the overall decision-making of the enterprise. In those circumstances, the Commission presumes that minority ownership will promote program diversity, which is the overriding goal of the FCC's minority ownership policy.[128] Once the FCC has made its determination and issued the tax certificate, the decision will not be challenged by the Internal Revenue Service.

E. Applying for the Tax Certificate

A tax certificate is obtained by filing a request with the FCC which describes the transaction and explains why it qualifies for tax certificate treatment. Typically, the request is filed by the seller simultaneously with the application for FCC consent to the underlying transaction. Generally, the Commission will not issue a tax certificate until after it has received written confirmation that the transaction closed.

Nevertheless, sellers often demand assurances from the buyer that the FCC will grant the tax certificate prior to entering into a binding contract to sell the property. However, minority entrepreneurs are unable to offer either their investors or potential sellers of broadcast and cable properties such assurances that the proposed transaction will qualify for tax certificate treatment. Because transactions are driven by the tax certificate benefits, a seller of a broadcast or cable property who is uncertain that a transaction will qualify for tax certificate treatment may be unwilling to sign a contract to sell the property to the minority-controlled company. In the past, the Commission issued advance written rulings that a proposed transaction will qualify for a tax certificate,[129] or it approved issuance of a tax certificate but withheld release of the certificate until the transaction has closed.[130] But awaiting written assurances from the Commission may introduce delay that either party may find unacceptable, thus undermining the usefulness of the tax certificate policy.

F. Tax Certificates As A Means of Attracting Investment Capital

Since 1982, the FCC has issued tax certificates to investors who provide start-up capital to minority companies formed to acquire broadcast or cable properties.[131] To qualify for such a tax certificate, the investment must meet the following criteria:

(1) The investor must have provided "start-up capital" to the minority enterprise, defined as funds provided within one year of the company's acquisition of a broadcast or cable property;

(2) The investor must have sold his interest in the company; and

(3) The company must qualify as a minority company under the tax certificate policy both *before* the investor purchases the interest and *after* he or she sells the interest in the company.

(4) A minority company that obtains a broadcast station through the benefit of a tax certificate must retain the station for at least one year. The Commission has determined that "the rapid resale of such a station to a non-minority at a profit would subvert the goal of increasing minority ownership of broadcast stations."[132] This rule does not apply, however, if the minority company proposes to sell the station to another minority company within the one-year period.

The policy is designed to assist minority companies to attract equity investors by offering them the prospect of a tax certificate upon the sale of their interests in the company.[133]

This minority company can offer tax certificates to the seller of the broadcast or cable property *and* to investors who will realize tax deferral benefits upon the eventual sale of their interests in the company. Minority entrepreneurs often overlook this later feature of the tax certificate policy, yet it is a quite significant means of enhancing the value of an investment in a minority-controlled enterprise.

The Tax Reform Act of 1986 (TRA) has created new challenges for buyers and sellers of broadcast and cable television properties. In particular, two changes have motivated sellers to seek new ways to minimize taxes and have also enhanced the value of tax certificates, which were unchanged by the TRA's massive restructuring of the tax laws. The TRA eliminated the General Utilities Doctrine, which had enabled shareholders to avoid the so-called "double taxation"--tax at both the corporate and individual levels--upon the sale of broadcast and cable properties. The TRA consolidated tax rates for ordinary income and capital gains, and, for the first time in history, the maximum corporate tax rate is higher than the maximum rate for individual income. As a result, last year the FCC issued thirty-one tax certificates for sales of broadcast stations to minority buyers; this is almost twice the number of tax certificates issued in any previous year.

H. Recommendations

Because the tax certificate policy is administered by both the FCC and the IRS, recommendations to enhance the policy are directed at both agencies.

1. The FCC should scrutinize closely all tax certificate requests to ensure that tax certificate applicants are bona fide minority enterprises. Highly suspect are deals like the purchase of WTVT-TV (*see* Part B, *supra*) in which options to purchase the stock of putative "controlling" minority principals which may be exercised unilaterally by nonminority investors a short time after the issuance of the tax certificate.

2. When the Commission expanded the tax certificate policy in 1982 to permit minority enterprises to offer tax certificate benefits to their investors, it apparently did not contemplate that the controlling shareholders in such companies, who are minorities, would also be able to obtain tax certificates upon the sale of their interests in the entity, or upon liquidation of the company. The Commission should further expand the tax certificate policy to allow minorities who invest in the entity to qualify for a tax certificate themselves upon the sale of their interest in the company.

3. The FCC should expand the tax certificate policy to include all telecommunications technologies subject to the FCC's regulatory jurisdiction, including common carrier technologies.

4. The Commission should adopt a procedure whereby it would release a tax certificate in draft form upon grant of the applications for FCC consent to the proposed transaction, but prior to consummation of the transaction. Typically, the sale of a broadcast property takes places approximately forty days after the FCC announces that it has granted applications to assign or transfer control of the license to the buyer. This would enable minority entrepreneurs to provide assurances to sellers and investors that the Commission is favorably disposed to issuing the tax certificate. The Commission would issue the tax certificate in final form upon consummation of the transaction.

5. The IRS should revisit its 1966 ruling which requires a tax certificate holder to reinvest the proceeds of a Section 1071 sale in a corporation that directly operates a communications business. Because most publicly-traded broadcast and cable companies operate through subsidiaries, reinvestment in the stock of a holding company which operates broadcast stations through a subsidiary, for example, would not qualify as a proper reinvestment.

The 1966 Revenue Ruling should be overturned to the extent that it precludes reinvestment in publicly traded companies with broadcast subsidiaries.

6. The IRS also should revisit Revenue Rulings which apparently hold that the purchase of interests in a partnership does not qualify as reinvestment in qualifying replacement property. Many investments in broadcast and cable companies are held through general or limited partnerships. Reinvestment in partnerships operating communications properties is fully consistent with the intent of Section 1071.

VIII. Minority and Female Preferences in Comparative Hearings

A. History of the Preference Policy.

The Commission decides among the applicants by means of an administrative proceeding called a comparative hearing. Since 1973, the Commission has awarded extra credit variously called a "merit", a "preference", or a "qualitative enhancement" to minority-owned applicants compete against other qualified applicants for a license.

The Commission's original policy was to grant preferences only if minority applicants were able to establish a nexus between their ownership and a resultant increase in diversity of programming. That policy was challenged in *TV 9, Inc. v. FCC.*[134] The Court held that the Commission should assume that minority ownership fosters program diversity; "[r]easonable expectation, not advance demonstration is a basis for merit. . . ."[135] The Court aptly noted:

> To say that the Communications Act, like the Constitution, is color blind, does not fully describe the breadth of the public interest criterion embodied in the Act. Color blindness in the protection of the rights of individuals under the laws does not foreclose consideration of stock ownership by members of a black minority where the Commission is comparing the qualifications of applicants for broadcasting rights in the Orlando community. The thrust of the public interest opens to the Commission a wise discretion to consider factors which do not find expression in Constitutional law. Inconsistency with the Constitution is not to be found in a view of our developing national life which accords merit to black participation among principals of applicants for television rights. However elusive the public interest may be, it has reality. It is a broad concept, to be given realistic content. . . .

> It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token, but in good faith as broadening community representation, gives a local minority group media entrepreneurship. . . .
>
> The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that *it is upon ownership that public policy places primary reliance with respect to diversification of content*, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news.[136]

The *TV 9* decision is the basis of the FCC current policy of awarding merit to minority applicants in comparative hearings. Such merit is not dispositive, but it is one factor considered to determine which of many applicants will best use a license to serve the public interest. Other factors include prior broadcast experience, local residence, full-time participation by the owner in station operation (referred to as "integration" of ownership and management), proposed program service, character, ability to use the allotted frequency efficiently, and diversification of control (ownership of other broadcast properties is counted against an applicant).[137] In 1978, the Commission extended the merit policy to female ownership and participation,[138] stating:

> Women are a general population group which has suffered from a discriminatory attitude in various fields of activity, and one which, partly as a consequence, has certain separate needs and interests with respect to which the inclusion of women in broadcast ownership and operation can be of value.[139]

However, the Commission concluded that "female" merit is of lesser significance than the minority merit because women had not suffered the same exclusion from the mainstream of society. Nevertheless, the Commission concluded that the female preferences were warranted in order to promote diversity of programming via diversity of ownership.

In *Garrett v. FCC*,[140] and *West Michigan Broadcasting Co. v. FCC* the Court reaffirmed the constitutional and statutory legitimacy of the Commission's minority preference policy. The Court in *Garrett* stated:

> The entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that "reasonable expectation," without "advance demonstration," gives them relevance.[141]

In the later case, West Michigan Broadcasting Company, whose application for a radio station license had been denied, challenged the constitutionality of the Commission's decision to award the license to an applicant because of her minority status.[142] West Michigan also contended that the FCC had exceeded its statutory authority by favoring a minority licensee in an area with a small minority population. The Court affirmed the FCC's decision to award a minority preference for a license to serve an area with a small minority population, endorsing the FCC's policy that adequate representation of minority viewpoints serves not only the needs of the minority community but also enriches and educates the nonminority audience.[143]

In deflecting West Michigan's constitutional attack, the Court concluded that the FCC's policy of awarding merit for minority ownership "easily passes constitutional muster in light of the various *Bakke* and *Fullilove* approaches."[144] The Court found two aspects of the FCC policy to be particularly important in meeting the constitutional standards for affirmative action programs:

> First, the Commission's award of minority enhancements is not a grant of any given number of permits to minorities or a denial to qualified non-minorities of the ability freely to compete for permits; it is instead a consideration of minority status as but *one factor* in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters. Second, the Commission's action in this case came on the heels of highly relevant congressional action that showed clear recognition of the extreme under-representation of minorities and their perspectives in the broadcast mass media. Congress found that this situation was a part of "the effects of past inequities stemming from racial and ethnic discrimination." H.R. Conf. Rep. No. 97765, 97th Cong., 2d Sess. 43 (1982), U.S. Code Cong. & Admin. News 1982, at 2287. Congress must be understood to have viewed the sort of enhancement used here as a valid remedial measure.[145]

Unfortunately, as discussed in Part B, *infra*, both the Court and the Commission have recently backed away from the strong constitutional stand taken in *West Michigan*.

The policy of awarding preferences in comparative hearings is different in several ways from the FCC's other minority ownership policies:

> Unlike distress sales and tax certificates, it offers no financial incentives to existing broad- casters. It also does not alleviate the hearing process as distress sales do. Instead, it applies to comparative hearings for new licenses the same affirmative action principles set forth by the Supreme Court in the *Bakke* case to remedy under-representation of women and minorities in publicly-funded educational institutions. For all of these reasons, the policy does not enjoy the full support of major industry organizations, or, needless to say, of other competing applicants.[146]

Nevertheless, despite lack of full support by the telecommunications industry, the minority and female preference policies have contributed to the gradual increase in minority- and female-owned broadcast properties. Since 1978, minority and female preferences have determined the outcome of approximately 100 license hearings.[147]

The preference policy is limited in its effectiveness by the small number of licenses each year that are subject to the comparative hearing process. Its effectiveness is further limited because, unlike a set-aside program, the preference policy does not guarantee that minority or female applicants will obtain licenses, but only that race or sex will be considered as relevant factors in the comparative hearing decision. But despite precarious support and somewhat limited effectiveness, the preference policy has served as an important component of the FCC's effort to increase female and minority ownership.

B. The Challenge to the Preference Policy.

In *Steele v. FCC*,[148] the D.C. Circuit reversed its longstanding support of the FCC's use of preferences to promote diverse ownership of broadcast properties. James Steele had lost his bid for an FM radio license because another applicant for the license was awarded credit for 100 percent female ownership and management. Steele appealed the Commission's decision in federal court, arguing that the female preference policy constituted sex discrimination in violation of the Constitution and that the FCC's adoption of the policy was arbitrary and capricious under the Administrative Procedure Act.

The Court, declining to reach the constitutional question, held that the Commission had exceeded its statutory authority in adopting the female preference policy. The Court found that the female preference policy was not justified by proposed findings or congressional approval. Although the Court purported not to address the constitutional issue, it stated that female preferences "run counter to the fundamental constitutional principle that race, sex, and national origin are not valid factors upon which to base government policy."[149] Moreover, the Court, implicitly rejecting its earlier decisions in *TV-9* and *West Michigan*, questioned the assumption that diversity of ownership leads to diversity of programming:

> There is no reason to assume, for example, that an Italian station owner would primarily program Italian opera or would eschew Wagner in favor of Verdi. Similarly it is questionable whether a black station owner would program soul rather than classical music or that he would manifest a distinctively "black" editorial viewpoint. Indeed, to make such an assumption concerning an individual's tastes and viewpoints would seem to us a mere indulgence in the most simplistic kind of ethnic stereotyping.
>
> Moreover, quite apart from the factual validity of this assumption, it is contrary to one of our most cherished constitutional and societal principles. That principle holds that an individual's tastes, beliefs, and abilities should be assessed on their own merits rather than by categorizing that individual as a member of a racial group presumed to think and behave in a particular way.[150]

Notwithstanding that gratuitous diatribe, the Court noted that the FCC had clear authority, based on congressional action and court precedent, to adopt *minority* preferences.[151] In the Court's view, the FCC did not have similar authority to adopt female preferences because "whatever the merit of these assumptions (*i.e.*, that diversity of ownership fosters diversity of programming) as applied to cohesive ethnic cultures, it simply is not reasonable to expect granting preference to women will increase programming diversity."[152] The Court concluded that the Commission exceeded the boundaries of its discretion by conducting "experiments in social engineering conceived seemingly by whim."[153]

In a lengthy dissent, Circuit Judge Wald criticized the majority's "breathtakingly iconoclastic judgment that such a credit (*i.e.*, the female preference) is beyond the FCC's statutory authority."[154] Judge Wald described the female preference as clearly within the FCC's public interest mandate as construed by the Appeals Court and the Supreme Court, and described the majority opinion as "shunning even token adherence to such precedent."[155] Judge Wald also disagreed with the majority's characterization of the diversity of ownership rationale, stating that the majority had:

> reduced it to a simplistic, one-dimensional notion that members of particular groups may all be expected to program in a uniform, predictable manner: Italians will program Italian opera; Blacks will program soul music; and women will program soft, 'feminine' music. *See* Maj. Op. at 1198, 1199. To the contrary, an integral part of the far more complex and sophisticated diversity rationale on which the Commission proceeded is the belief that increased participation of minorities and women will help prevent the perpetuation of just such simplistic stereotypical portrayals of minorities and women as those attributed to the Commission by the majority.[156]

In response to *Steele*, the Commission inexplicably suspended both female *and* minority preferences and distress sales and issued a Notice of Inquiry[157] to reexamine the legal and factual predicates for all of its minority ownership policies. Although *Steele* explicitly applied only to female preferences, the Commission reasoned that minority ownership policies might be vulnerable to the same attacks as the female preference policy. The stated aim of the Inquiry was to determine whether there is a nexus between minority/female ownership and diversity of programming, and whether such ownership is necessary to achieve diversity.

Before the FCC could proceed with its inquiry, Congress attached a rider to an appropriations bill requiring the Commission to reinstate its minority and female ownership rules and to halt the inquiry.[158] Congress has recently renewed that temporary measure, but has not taken action to ensure the permanence of the FCC's of minority and female ownership.

However, the FCC apparently has reconsidered its hasty retreat from its minority ownership policies in a case currently before the federal appeals court. The Commission's brief in *Winter Park Communications v. FCC*,[159] contends that its minority preference policy is within the agency's statutory authority and is constitutional. Citing Congress' reinstatement of the ownership policies as a clear expression of its intent, the

FCC concludes that "there is no longer any doubt that the FCC has authority, indeed is obligated, under the Communications Act to implement minority and gender preference in its comparative broadcast licensing process."[160]

Moreover, the factual challenge posed by the Court in *Steele* (*i.e.*, to demonstrate a nexus between diversity of ownership and diversity of programming) has been answered. A recent study by Congressional Research Service[161] investigated the connection and concluded that:

> the groups of stations that do have minority owners have a greater proportion of their stations programming for their own minority audience and, to a lesser extent, to other targeted audiences than do stations with no minority owners. Stations with women owners follow the same general pattern. . . . Therefore, an argument can be made that FCC policies that enhanced minority and women station ownership may have resulted in more minority and other audience-targeted programming. To the degree than increasing minority programming across audience markets is considered adding to program diversity, then, based on the FCC survey data, an argument can be made that the FCC preference policies contributed, in turn, to programming diversity.[162]

Although conditioned by caveats concerning the quality of the data, that conclusion answers the challenge raised by the Court in *Steele*.

In sum, a solid defense to the constitutional challenge implicit in *Steele* is found in current law. The First Amendment, the Communications Act, FCC policy and precedent, congressional actions, and decisions of the Supreme Court and federal appellate courts combine to support the constitutionality of the minority and female preference policy.[163]

Ultimately, the constitutionality of the FCC's preference policy may be definitively resolved by future decisions of the Supreme Court in other affirmative action cases. Congress should enact legislation explicitly recognizing past discrimination against women and minorities in the licensing process.[164] Such congressional recognition would strengthen the constitutional basis for minority and female preferences under existing precedents. The FCC and Congress acting together can best protect minority and female ownership policies by carefully conforming them to the changing requirements of constitutional law and by taking full advantage of the law to promote minority and female ownership.

C. Recommendations.

1. The FCC should strongly and publicly reaffirm its commitment to minority and female preferences, citing strong court precedent and congressional support.

2. Congress should consider the need for additional fact-finding concerning past discrimination towards minorities and women in the communications industry and in license proceedings, as well as the nexus between diversity of ownership and diversity of programming. Such findings would strengthen the constitutional basis for policies to promote minority and female ownership.

3. Although an applicant's prior broadcast experience is a minor factor in most comparative hearings, minority and women applicants often have difficulty showing significant broadcast experience due to their past exclusion from the field. The Commission should allow minority and female applicants to use management experience in other fields in support of their applications. This would enlarge the pool of qualified minority and female license applicants and counteract the effects of past discrimination.

IX. Conclusion

The FCC was created with a clear mandate to administer a vital, limited national resource in the *public* interest, and to invest our First Amendment rights with real meaning during times of great technological and social change. To the extent that the Commission fails to promote diversity among those who control our telecommunications resources, a significant part of its mandate is neglected. This paper highlights the gradual decline during the 1980s in Commission actions to promote equal employment opportunity and minority ownership. It also challenges the Commission to renew its commitment to actively promote these programs as well as seek further policy initiatives that will increase ownership diversity. The Commission must not abdicate its "public interest" responsibility for ownership diversity by resorting to a more "laissez-faire", free-market philosophy.

One communications attorney who has addressed the problem of deregulation in the broadcast media, describes the situation as follows:

> The concept of 'deregulation' of the broadcast media, which implies lessened regulatory requirements for broadcast licensees, has dominated the regulatory landscape for the past decade. Its dominance has inexorably altered the range of possibilities available for attempts to encourage racial and ethnic pluralism in the mass media. Deregulation has created a regulatory atmosphere in which the permissibility of regulation is judged by whether the regulation addresses a market failure that cannot be remedied by reliance on marketplace forces without governmental intervention.
>
> The experience of broadcast regulation in the 1980s demonstrates that racial and ethnic access to the broadcast media is not fostered by marketplace forces. Rather, the decimation of prior regulatory mechanisms

> designed to ensure minority access to the media has resulted in a market that has not produced minority-oriented programming. In the face of a broad-based market failure, it is appropriate to consider renewed regulation to foster racial and ethnic pluralism in the media, even under tests favored by advocates of deregulation.

Minority and female underrepresentation in the broadcast media represents the type of market failure that requires positive intervention, regardless of prevailing sentiments in favor of deregulation of mass media services. Policies developed by the Congress, the federal courts, and the FCC have had limited success in promoting diversified ownership and programming over the years and must not be abandoned.

CHAPTER XX

WERE YOU COUNTED?--CIVIL RIGHTS AND THE 1990 CENSUS

by James B. Steinberg
with the assistance of
Anita Hodgkiss

I. Introduction

Next year will mark the bicentennial of the American census. For the twenty-first time since the founding of our nation, the federal government will conduct its decennial count of the American people, in accordance with the provisions of Article I, Section 2 of the United States Constitution.[1]

That census will have a profound impact on the life of every resident of this country. It will determine how many members of Congress are allocated to each state, and will guide the individual states in drawing congressional district lines.[2] It will determine the allocation of billions of dollars in federal funds.[3] The census data will be used to redistrict state and local legislative bodies, to measure compliance with important civil rights laws, such as the Voting Rights Act and employment discrimination statutes, and to assure the fair composition of juries.[4] Private industry will use information from the census to determine where to site new factories, and where to sell new products.[5] Government planners will use the information to guide major policy decisions in areas such as the environment, transportation, housing, and education.[6]

A fair and accurate census is essential to assure that most basic of civil rights--the guarantee of "one person-one vote."[7] In 1970 a difference of just 250 in population led to the allocation of the 435th seat in Congress to Oklahoma instead of Oregon.[8] The Supreme Court has held that disparities between electoral districts of less than 1 percent may violate one person-one vote.[9] Thus, even small inaccuracies in the census can have significant political consequences.

From the time of the first census, the problems of obtaining a true count of the population were well known. As George Washington observed after the census of 1790: "[O]ne thing is certain our real number will exceed, greatly, the official returns of them; because the religious scruples of some, would not allow them to give in their lists; the fears of others that it was intended as the foundation of a tax induced them to conceal or diminished theirs, and thro' the indolence of the people and the negligence of the many of the Officers numbers are omitted."[10]

If the census misses (or "undercounts") individuals uniformly across geographical areas and groups within the population, than there would be little significance to the undercount. But when the undercount is not uniformly distributed, basic civil rights may be infringed upon. And the overwhelming evidence of the last fifty years suggests there is a significantly larger undercount of groups such as blacks, Hispanics, and other minorities.

For this reason, representatives of minority groups, civil rights organizations, some members of Congress, and state and local officials have urged that the census be corrected to reduce the differential undercount.[11] Many prominent statisticians and demographers support this position. The Census Bureau itself was prepared to go forward with procedures that would permit an adjustment of the 1990 census.[12]

Nevertheless, on October 30, 1987, the Department of Commerce announced that it would not correct the 1990 census. The Department also ordered the Census Bureau to curtail its plans to conduct a Post Enumeration Survey that is essential if any adjustment is to be made.

Because the census has such broad ramifications, the Department's unwillingness to take additional steps to correct known deficiencies in the census is one of the most significant civil rights issues facing the country today. If the issue is not resolved by the Congress or the new administration before the census results are certified at the end of 1990, it is certain to become a major issue in the courts.[13]

II. The Nature and the Extent of the Undercount

Since 1940, when the Census Bureau first began to measure the nature and extent of the undercount in the census, there has been strong evidence that minorities have suffered a greater undercount than whites. (This is called a "differential undercount.") The Bureau estimates that in 1940 the census missed 5.1 percent of the white population, and 10.3 percent of the black population--a differential undercount of 5.2 percent.[14]

Although improvements in census procedures have increased the overall percentages of both whites and blacks counted in the census, the differential undercount has not declined. By 1980, the census estimates that only 1.4 percent of the population was not counted (compared with 5.6 percent overall in 1940). The white undercount in 1980 was just .7 percent while the black undercount was 5.9 percent--a differential of 5.2 percent (identical to the differential in 1940).[15] Put another way, blacks were more than eight times more likely to be missed in the census than whites. More than half (53 percent) of all those not counted in 1980 were black--even though blacks made up only 11.7 percent of the total population.[16]

The undercount for certain subgroups of blacks is even greater than is shown by these overall figures. For example, among black males between ages 25-50, the undercount was 15 percent.[17] And for minorities in urban areas, estimates suggest that the undercount may be around 10 percent.[18]

Although the data is less clear, there is evidence that Hispanics, too, are undercounted to a much greater degree than whites. Some estimates place the Hispanic undercount between the black and white rates; others suggest that undercount of Hispanics is similar to that of blacks in America.[19] There also may be a significant differential undercount of other racial and ethnic minorities, such as Asian-Pacific-Americans.[20]

Undercounting also affects different regions differently, with higher rates of undercount for inner cities and rural areas--those areas with high percentages of minorities and low- income individuals.[21] This is why urban officials have been active in efforts to challenge the methodology of the census.

III. Why Minorities and Other Disadvantaged Groups are More Likely to be Missed by the Census

There are a number of reasons why minorities and other disadvantaged individuals are less likely to be counted in the census. They include:

- Failure to appreciate the importance or significance of being counted by the census.
- Lack of education, illiteracy or inability to read English that make it difficult to complete or understand census forms.
- Suspicion and mistrust of government (despite the census promise of confidentiality) that leads individuals to fear that census information will be used by law enforcement or immigration officials, or to jeopardize eligibility for social welfare programs.[22]
- Lack of identifiable residence for transients, seasonal workers, and the homeless, and the fluctuating composition of household units in poorer communities.[23]

These difficulties in counting minority and other disadvantaged groups are exacerbated to some degree by the procedures used by the Census Bureau in conducting the census. The mail-out, mail-back method tends to disfavor those with poor literacy and low appreciation of the importance of the Census.[24] Follow-up visits by enumerators are less likely to be effective in high-crime neighborhoods, or where enumerators have little personal experience with certain types of housing arrangements (*e.g.*, public housing). The use of the household as the basic unit for accounting is least likely to be effective in communities and groups with living arrangements that differ from the nuclear family.[25]

These problems are certain to persist in the 1990 census, and may, as some officials have acknowledged, actually grow worse.[26] The increase in the number of homeless will certainly compound a counting problem in a census where the fun-

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damental unit for counting is the household unit. Shortages of public and low-income housing (due to drastic cutbacks in housing assistance programs) have led to an increase in the number of families doubling or tripling up in housing. Because these arrangements may violate zoning regulations, leases, or public housing regulations, tenants in this situation may be reluctant to report the true number of persons living in the housing unit. The completion of the immigration amnesty program and new penalties under the Immigration Reform and Control Act may inhibit participation by Hispanics and other immigrant groups, especially undocumented persons.[27] High crime rates in inner cities will deter effective programs to count those who are missed by the mail census.

IV. Improving the Accuracy of the Count: Coverage Improvement v. Adjustment

All of those involved with conducting or assessing the census agree that there is a differential undercount. But there is sharp disagreement over which of two basic approaches--coverage improvement or statistical adjustment--should be used to reduce the differential.

Up through and including the 1980 census, the Census Bureau's approach centered around a series of activities known generically as coverage improvement. Coverage improvement activities for 1980 included expanding the precensus house lists checks by the post office and directly canvassing some of the housing to check the post office lists; double checking every address originally classified as vacant or nonexistent (the "vacant-delete" check); comparing census rolls to other agency lists (drivers' licenses, welfare rolls, etc.), using community service representatives to reach the hard to count, printing a special form in Spanish, and establishing a "a local review program" which shared preliminary census house counts with local officials to give those officials an opportunity to suggest places where people might have been missed.[28]

The Bureau's coverage improvement efforts have been criticized by those within--and outside--the Bureau as not cost-effective,[29] and, in some cases, actually leading to an increase in the differential undercount.[30] The Director of the Census Bureau, John Keane, has himself acknowledged that, "statistical techniques are the only potential means of reducing the differential undercount."[31]

The limitations of traditional coverage improvement programs were well known to the Bureau at the time of the 1980 census. At that time, the Bureau explored various approaches to correcting the data, but, shortly before the statutory deadline for reporting the data to the president, the then-Director of the Bureau, Vincent Barabba, concluded that an adjustment, or correction, was not feasible based on existing knowledge and techniques. The decision was challenged in fifty-two lawsuits, but none of the challenges were successful.[32]

In light of its experience in 1980, the Bureau launched an ambitious program to determine whether new techniques and procedures might permit the compiling of a more accurate census in 1990; specifically, procedures that would reduce the differential undercount.[33]

By the spring of 1987, the staff of the Bureau, and several outside advisory groups including the committees of the National Academy of Sciences and the American Statistical Association,[34] concluded that adjustment to reduce the differential undercount was technically feasible,[35] using the technique of dual estimation.[36] The staff's confidence in this approach was reinforced by a trial of the technique conducted by the Bureau in Los Angeles in 1986. While accepting the technical feasibility of adjustment, based on these demonstrations, the Bureau and its advisors expressed some uncertainty about the "operational feasibility" of applying these techniques to the national census in a way that would permit completing the work in time for the statutory deadline.[37]

Based on these conclusions, the director of the Bureau proposed, in June 1987, that the census proceed on the assumption that the techniques would be applied, but reserving a final judgment until the data was collected and the reliability of the adjustment techniques could be assessed (in the fall of 1990).[38]

Notwithstanding the Director's recommendation, in October 1987 the Department of Commerce ordered that no adjustment would take place, and reduced the Bureau's plan for a Post Enumeration Survey (PES) of 300,000 households (which was essential to the Bureau's approach to permit an adjustment) to just 150,000 households.[39] Instead, the Department chose to rely exclusively on traditional coverage improvement techniques to reduce the differential undercount.[40]

The Commerce Department has offered a variety of explanations for its decision. They include:

1. uncertainty about the degree and extent of the undercount;

2. inappropriateness of sampling techniques to correct the census;

3. inability to complete the adjustment in time to meet statutory deadlines for reporting data;

4. the danger of "number shopping" and political interference;

5. difficulties in applying nation wide the techniques tested in small samples as well as the difficulties in applying statistical techniques to small geographical areas (*e.g.*, census blocks); and

6. diversion of resources to adjustment related activities might unduly undermine the accuracy of the basic census itself.[41]

Some of the Department's objections are based on its reading of the Constitution and statutes (these will be discussed below); others are technical. Although there are continuing disputes within the expert community, certain things seem clear. First, the methodology of correction has advanced considerably since 1980 (when the Bureau itself found adjustment infeasible), to the point where both the Bureau and its expert advisory committees believed adjustment to be technically feasible. Second, although the exact amount of undercount is subject to dispute, the existence of differential undercount is accepted by virtually every expert. Third, although the operational difficulties of adjustment are considerable, the Commerce Department's October 30, 1987 decision left no room for even attempting to judge the feasibility and desirability of adjustment in light of the actual experience of the 1990 census.[42]

V. The Legal and Constitutional Issues

The Commerce Department has contended that both the Constitution and relevant statutes prohibit the adjustment of the Census using statistical techniques. The Department further argues that even if adjustment is permissible, the Secretary of Commerce is entitled to exercise his expert judgment to conclude that the use of statistical techniques will not produce a more accurate census--and that the courts should not overturn that judgment.

Proponents of adjustment argue, by contrast, that not only is adjustment permitted by the Constitution and the Census Act, but adjustment is actually required where there is a significant differential undercount (particularly an undercount that harms minorities), and that there are now proven statistical techniques that provide a more accurate count. They further assert that in light of the advances in statistical techniques, and the Census Bureau's own judgment that adjustment is technically feasible, the Department of Commerce was not entitled to prohibit the use of those statistical techniques.[43]

Background: Article I, section 2 clause 3 of the Constitution (as amended by the 14th Amendment) established the basic requirement that in order to determine the "number" of persons for the purposes of apportioning members of Congress among the states, the "actual enumeration shall be made within three Years after the first Meeting of the Congress of the United States and within every subsequent Term of ten Years, in such Manner as they by law shall direct."

Congress has exercised the power granted to it under this clause by enacting Title 13, section 141(a) of the U.S. Code, which provides

> The Secretary [of Commerce] shall, in the year 1980 and every ten years thereafter, take a decennial census of population, as of the first day of April of such year, which date shall be known as the 'decennial census date' in such form and content as he may determine, including the use of

> sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.[44]

Congress also specifically addressed the issue of sampling as it applies to apportionment: "Except in the determination of population for purposes of apportionment . . . the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title."[45] The Department is required to provide state-by-state data to the president by December 31 of the census year, and more detailed data to the individual states by April 1 of the following year (to permit states to draw their Congressional district lines within the states).[46]

VI. Is Adjustment Permitted by the Constitution and the Census Act?

The Department of Commerce has argued that the "actual enumeration" language of the Constitution forbids adjustment of the census. Alternatively, it argues that even if the Constitution permits adjustment, the kind of adjustment usually sought by proponents cannot be used for apportionment by virtue of 13 U.S.C. sec. 195.

During the litigation surrounding the 1980 census, those courts that considered the constitutional issue concluded that the Constitution did not prohibit--and may, under some circumstances, require--the use of statistical techniques in connection with the census.[47] Although the Supreme Court has not directly addressed the issue, it would seem clear from the Supreme Court's decision in *Wesberry v Sanders* 376 US 1 (1964) that the Constitution established the census requirement to provide the most accurate population count to assure fair representation in Congress.[48] This reasoning suggests that the framers' primary goal was accuracy, and that the use of methods that increase accuracy would be consistent with the overall purposes of the apportionment clause and the second section of the Fourteenth Amendment.[49]

The Census Bureau's own practices are inconsistent with a rigid reading of the words "actual enumeration" in the Constitution. For example, the Bureau uses a process called "imputation" to assign a number of residents to some residential units even though its normal procedures (mail-out, mail-back, follow-up visits by enumerators) fail to identify any residents. In 1980, "726,000 people were imputed or added into the census for 'addresses' on mailing lists with no information on whether or not the premises were occupied."[50] The use of imputation has actually led to an overcount (by imputing residents where, in fact, there are none). The process of imputation can have dramatic consequences. Indiana lost a seat to Florida in the 1980 census as a result of imputations, even though Indiana received just .4 percent fewer imputations than its proportion of the U.S. population.[51]

Overall, the Census Bureau added 4.9 million people to the 1970 census using imputation and other techniques.[52] In the words of the former Associate Director of the Census Bureau: "Estimation was used to add unseen people to the count and they were included in the apportionment count."[53] If the Bureau believes that these techniques (which count "fictional" individuals) are constitutionally permissible, it is difficult to understand why it is not equally permissible to use other techniques to make up for known undercounts of minorities and other disadvantaged individuals.

Indeed, some argue that the Constitution, far from prohibiting adjustment, may actually require adjustment, if the failure to adjust would lead to a less accurate count.[54]

Although section 195 of Title 13 of the U.S. Code bars "sampling" as the basis of apportionment, there are other statistical methods available that would improve the accuracy of the census, and the legislative history of this provision does not indicate that Congress intended to bar the Census Bureau from using these other statistical techniques as a supplement to the census count (assuming that they are otherwise constitutionally permissible).[55] This would seem particularly true where, as here, the Census Bureau proposes to use dual estimation in addition to the basic census, not as a substitute to the count.[56]

The Commerce Department finally argues that even if adjustment is permitted under the Constitution and relevant statutes, the issue of whether such an adjustment is feasible and likely to produce a more accurate count is one which should be left to the Department to determine in the exercise of its own expertise.[57] The Department contends (as it did in connection with the 1980 census), that, given the uncertainties surrounding the method of adjustment, it is entitled to conclude that no adjustment will be made.

This argument was accepted by some of the courts in the litigation surrounding the 1980 census.[58] But significant improvements in the techniques since 1980 have weakened the Department's position. Although most courts have acknowledged that the Department is entitled to some deference in making this kind of technical assessment, the Department may not arbitrarily dismiss the arguments in favor of adjustment. The fact that the Director of the Bureau of the Census and the expert advisory committees found that an adjustment was feasible may well lead the courts to conclude that the decision not to adjust was arbitrary--particularly since the decision was made before the Department even attempted to judge the quality of data from the PES.[59] Although, as in any administrative proceeding, the agency is entitled to some deference from the courts, the fact that constitutional rights are at stake should lead the courts to examine the Department of Commerce's position closely.[60]

The decision not to adjust the census data is likely to be challenged not only by those who are concerned about congressional apportionment and redistricting, but also by those who feel that the undercount will deprive them of federal funds that are distributed on the basis of census data. Because Congress specifically authorized the use of sampling techniques for census data other than for apportionment, the Commerce Department's decision not to go forward with adjustment is particularly vulnerable in these cases.[61]

VII. Conclusion

The persistent undercount of blacks, Hispanics and other minorities in the census systematically deprives individuals in these groups of basic political and civil rights. Traditional methods of improving coverage will not eliminate the differential; but new statistical techniques, proven in the field and supported by the weight of expert opinion, can go far toward eliminating the bias in the census against minorities, inner cities and rural areas. Although time is short, adjustment of the 1990 census is still feasible if the Commerce Department acts promptly. The Constitution, and fundamental fairness, requires no less.

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CHAPTER XXI

VOTING RIGHTS ENFORCEMENT IN THE REAGAN ADMINISTRATION

by Frank R. Parker[1]

I. Introduction

In June, 1983, Assistant Attorney General William Bradford Reynolds, the Reagan administration's chief civil rights enforcement officer, toured Mississippi at the invitation of the Rev. Jesse Jackson, joined hands with Jackson and sang "We Shall Overcome," and promised a "war on discrimination." One month later, Reynolds refused to authorize the filing of ten of eleven new lawsuits drawn up by career attorneys in the Voting Section to ensure equal voting rights for black voters in the upcoming 1983 Mississippi county elections.[2]

This incident illustrates the contradictions of civil rights enforcement for the past eight years. While paying lip service to civil rights, the Reagan Administration actually attempted to undermine and defeat effective civil rights enforcement in significant areas. In the past, civil rights groups and minority voters generally have looked to the Justice Department to provide leadership and effective enforcement in voting rights. Although there have been lapses, particularly during the Nixon administration,[3] the Reagan administration set a new record for nonenforcement, retreats, and defaults in voting rights. In too many instances, the Department moved from the position of objective and impartial enforcement of the Voting Rights Act to being the friend and advocate for the white perpetrators and beneficiaries of racial discrimination.

The Reagan administration opposed every major effort to strengthen and vigorously enforce voting rights protection for minority citizens. The administration opposed strengthening the Voting Rights Act in 1982 by eliminating the necessity of proving discriminatory intent, failed to file any new cases to enforce the 1982 legislation for a year and a half after it became law, and, when the first major case involving the amended Act reached the Supreme Court, filed a brief in opposition to the black voter plaintiffs and espoused extreme positions that would have seriously undermined effective enforcement. To an unprecedented extent, the administration countenanced political interference in its voting rights enforcement. The administration also resisted the implementation of effective remedies once a voting rights violation has been found by opposing race-conscious relief that would give minority voters a realistic opportunity to elect candidates of their choice and by supporting at-large seats as a remedy for discriminatory at-large elections.

The Reagan administration also attempted to undermine the effectiveness of the federal voting law preclearance requirement of Section 5 of the Voting Rights Act. Under the Reagan administration, the Section 5 objection rate was reduced to one-third the rate of prior administrations. The administration in numerous instances failed to block racially discriminatory voting law changes, approved discriminatory new voting laws that had been rejected by prior administrations, adopted or acquiesced in restrictive interpretations of the scope of the Section 5 preclearance requirement, and attempted to water down its own Section 5 administrative regulations.

II. THE PROBLEM

Almost twenty-five years after its passage in 1965, the promise of the Voting Rights Act remains unfulfilled. The Voting Rights Act of 1965 struck down the literacy tests and the poll tax that prevented minorities from registering and voting.[4] But since the Act was passed, numerous studies have shown that the literacy tests and the poll tax have been replaced by a second generation of disfranchising devices that dilute minority voting strength and prevent newly-enfranchised minority voters from electing candidates of their choice to office.[5] These include such devices as racial gerrymandering of election district lines, discriminatory multimember districts, at-large elections, majority vote requirements, numbered post requirements, municipal annexations, and the like.[6] The Supreme Court has held that the right to vote can be denied as much by dilution of minority voting strength as by an absolute prohibition on voting.[7]

These structural barriers to casting an effective ballot have a substantial and persistent adverse impact on minority representation at every level of government. Although black people make up 11 percent of the nation's population, black elected officials constitute only 1.5 percent of the elected officials nationwide.[8] Hispanics, Native Americans, and other minority voters similarly remain substantially underrepresented at all levels of government throughout the country.

In addition, one of the major unresolved problems is discriminatory barriers to voter registration by minority and working class citizens. Today the United States has the lowest voter participation rate of any of the major industrialized democracies, with participation in national elections hovering at just over 50 percent of those eligible.[9] A principal cause of this scandalously low rate of voter participation is voter registration barriers, such as restrictions on time and place of registration, dual registration requirements, failure of local officials to appoint deputy registrars, and similar restrictions.[10] The Citizens' Commission on Civil Rights, in its recent report *Barriers to Registration and Voting: An Agenda for Reform*, found that these restrictive voter registration practices have a particularly disproportionate impact on minorities, the poor, and the disabled.[11] These conclusions were confirmed in ***Mississippi State Chapter, Operation PUSH v. Allain***, a Mississippi case, in which the court found that a prohibition on satellite registration, restrictions on time and place of voter registration, and a dual registration requirement were responsible for a 25 percentage-point disparity between white and black voter registration rates.[12]

The civil rights movement won a great victory in 1982 when Congress strengthened the nationwide enforcement provisions of the Voting Rights Act and extended its special enforcement provisions that apply only to covered states for 25 years.[13] Plaintiffs in voting rights cases no longer have to prove that a challenged voting system was adopted or maintained for a racially discriminatory intent; it is sufficient to prove that it has racially discriminatory results.[14] Although the Act itself gives the Justice Department the primary enforcement responsibility, Justice Department enforcement under the Reagan administration has been characterized by opposition to strengthening the provisions of the Act, lack of effective enforcement, political interference, retreats, and defaults over the past eight years. In consequence, private groups and minority voters have been forced to shoulder the primary role of enforcing the strengthened Act.

III. The Justice Department's Enforcement Responsibilities

The Justice Department's principal enforcement responsibilities are under Sections 2 and 5 of the Voting Rights Act. The Department has the responsibility under Section 2 for bringing lawsuits to eliminate voting practices and methods of election that result in a denial to minority voters of an equal opportunity to elect candidates of their choice.[15] Under Section 5 the Department has the duty to review voting law changes enacted in nine states and parts of seven others which have a past history of voting discrimination (the "covered jurisdictions") and to object when the covered state or locality fails to prove that the new law does not have a racially discriminatory purpose or effect.[16] The Department also has the responsibility to file lawsuits to block implementation of voting law changes covered by Section 5 that have not been submitted for federal preclearance. In addition, the Department is responsible for dispatching federal registrars (examiners) and poll watchers (observers) to covered states when needed, defending bailout suits brought by covered states and localities seeking to exempt themselves from the special enforcement provisions, enforcing the bilingual registration and election requirements for voters not proficient in English, and enforcing the provisions relating to absentee voting by members of the armed forces and overseas citizens. Although the Act also has criminal sanctions, the Reagan administration Justice Department has never used them to enforce the nondiscrimination requirements of the Act.[17]

IV. Opposition to Strengthening the Act's Protection

No sooner did the administration take office, when it engaged itself in an ultimately unsuccessful battle with bipartisan majorities in both houses of Congress and all the major national civil rights organizations over strengthening and extending the Voting Rights Act.

In 1980 the Supreme Court dealt effective voting rights enforcement a serious blow when in *City of Mobile v. Bolden*[18] it interpreted the Fourteenth and Fifteenth Amendments to the Constitution, and Section 2 of the Act, to require proof of discriminatory intent in voting rights cases. Before 1980 discriminatory voting laws could be invalidated under the Fourteenth and Fifteenth Amendments and the Voting Rights Act upon proof that they had the effect of denying to minority voters an equal opportunity to elect candidates of their choice.[19]

Requiring proof of discriminatory intent severely limited the effectiveness of the constitutional and statutory prohibitions against voting discrimination. Discriminatory intent is very difficult to prove because ultimately it requires proof of what was in the minds of public officials when they adopted or retained a voting law that disadvantages minority voters. Unless enactment of such a law is accompanied by a "smoking gun," such as direct statements of discriminatory intent--which are very rare these days--courts are reluctant to impute a discriminatory purpose. The discriminatory intent standard also is divisive because, in effect, it requires federal judges to brand public officials as racists in order to grant relief, and most federal judges are reluctant to attach such a label to respected public officials in the community in which they live. Further, the discriminatory intent standard is made more difficult by legal limitations on proof--the inability to ascertain the motives of legislators who may have adopted a voting law one hundred years ago, and rules of "legislative immunity" that prevent voting rights plaintiffs from cross-examining legislators regarding their motives. Finally, defendants in voting rights cases have proven themselves very adept at providing innocent and nonracial rationalizations and justifications for even the most discriminatory voting laws to overcome an inference of discriminatory purpose.[20]

The impact of the Supreme Court's adoption in 1980 of this new discriminatory intent standard was devastating to voting rights litigation. Court decisions striking down discriminatory voting systems were reversed for failure to prove discriminatory intent. The most dramatic example occurred in Edgefield County, South Carolina, where blacks had been totally excluded from representation on the county council because of at-large elections. Five days before the Supreme Court's *Mobile* decision, black voters in Edgefield County won a striking victory when the district court invalidated countywide voting for the members of the county council because it diluted black voting strength. Four months later the district court reversed its own prior decision and upheld the at-large system under the *Mobile* decision because plaintiffs were unable to prove that at-large voting had been adopted or maintained for a racially discriminatory purpose.[21]

As a result of these developments, amending the Voting Rights Act to eliminate the requirement of proving discriminatory intent and to restore the prior legal standard became a high priority for all the major national civil rights organizations. In 1981 the House of Representatives, with strong bipartisan support, by a vote of 389 to 24 passed a bill amending Section 2 of the Act to eliminate the requirement of proving discriminatory intent and to substitute an easier-to-prove "results" test. While the bill was pending in the House, the administration refused to take a position.

But when the bill reached the Senate in 1982, both Attorney General William French Smith and Assistant Attorney General William Bradford Reynolds opposed eliminating the intent test in testimony before the Senate Judiciary subcommittee.[22] They contended that an effects test would have far-reaching consequences and would result in the invalidation of election laws of long standing whenever the law "produces election results that fail to mirror the population makeup in a particular community,"[23] despite the fact that the bill itself contained a proviso stipulating that lack of proportional representation alone was not the test.[24] The administration also sought to limit the extension of the targeted enforcement provisions of the Act--such as Section 5--to ten years.

An overwhelming bipartisan majority in the Senate, by a final vote of 85 to 8, rejected the administration's position. Section 2 was amended to eliminate the intent test, and Section 5 was extended for twenty-five years. During Senate consideration of the Voting Rights Act extension, Republican majority leader Robert Dole played a major role in support of a strengthened and extended Voting Rights Act.

V. Retreats and Defaults in Litigation

A. Retreat from Vigorous Enforcement Through Litigation

Having failed in his effort to prevent Congress from adopting the Section 2 "results" test, Reynolds did little to enforce it in the period immediately after it was passed. Although cases commenced under the preceding administration were litigated under this new standard and Reynolds announced the formation of a new "Section 2 unit" in the Voting Section of the Civil Rights Division, Reynolds failed to authorize the filing of any new Justice Department lawsuits to enforce the new Section 2 "results" standard for almost a year and a half after it became law.[25]

Subsequently, given the enormous resources available to it, the Justice Department has filed relatively few substantive lawsuits in the past eight years affirmatively to enforce the nondiscrimination requirements of the Voting Rights Act. Although Reynolds has claimed credit for filing or participating in almost one hundred voting rights cases during his tenure,[26] most of these cases have been interventions in private lawsuits already filed (and in most of these the Justice Department did not even litigate the merits of the claimed voting rights denials), friend of the court briefs (which in significant instances opposed positions taken by the minority voter plaintiffs), defense of cases filed by covered jurisdictions seeking to preclear new voting law changes or to bail out from under the special coverage of the Act (which the Department is required by law to defend), and cases involving sections other than Sections 2 and 5 (most of which have been settled before trial).[27]

The substantive litigation enforcement effort boils down to only thirty-one cases filed to challenge discriminatory voting practices under Section 2 and only fifteen cases filed to enforce the Federal preclearance requirements of Section 5.[28] With twenty-seven attorneys in the Voting Section, this means that each Justice Department attorney with voting rights responsibilities on average handled only 1.7 substantive cases for this eight-year period. Current statistics are not available on the number of cases filed by private civil rights organizations since January, 1981, but it is safe to say that private groups, with their more limited resources, altogether probably filed ten times, or more, as many racial voting cases as the Justice Department during this period.

The extent of the Justice Department voting litigation effort looks even smaller when it is compared with the total number of voting cases filed nationwide. According to statistics published by the Administrative Office of the U.S. Courts, reproduced on Table 1, a total of 1,792 voting cases were filed in federal courts in the United States from 1981 to 1988. This figure includes race discrimination cases as well as other types of voting cases. In sixty of these cases, including Section 5 preclearance cases, bailout cases, and the like, the United States was named as a defendant, and thus the Justice Department was obligated by statute to defend them. Of the remaining 1,732, the United States was a plaintiff in only seventy-five, or only 4 percent. Thus, it is apparent that the civil rights community, not the Justice Department, has been forced to bear the burden of redressing voting rights denials over the past eight years.

One result is that certain categories of voting discrimination have been left unredressed by the Department. For example, although privately-funded civil rights groups filed a number of cases (see Table 1) challenging time and place restrictions on voter registration and other registration restrictions, the Justice Department filed only one case, a case challenging the remaining vestiges of Mississippi's dual registration requirement.[29] This case was not filed until three years after a joint Lawyers' Committee for Civil Rights Under Law-NAACP Legal Defense Fund case was filed challenging the same restriction, and the problem was resolved in the Lawyers' Committee-Legal Defense Fund case.[30]

The responsibility for this failure to file more cases--as with other instances of nonenforcement listed in this chapter--does not lie with the career leadership or professional staff of the Civil Rights Division's Voting Section, but with the political appointees at the top and their cadre of special assistants who exercised tight control over the litigation program. In significant instances, as the Mississippi example cited at the beginning of this chapter indicates, Reynolds overruled the recommendations of his own career staff and refused to file more lawsuits to protect minority voting rights.

Unlike some other sections of the Civil Rights Division, there was no massive exodus of career attorneys from the Voting Section during the Reagan years, and these professionals should be commended for staying on and for continuing their efforts to file and litigate voting rights cases despite the restrictions and regressive policies imposed by the political appointees and their special assistants. The career staff should be particularly commended for persevering in its litigation of the Dallas County, Marengo County, and Mobile, Alabama, Section 2 cases commenced during the prior administration, and for significant successes in new Section 2 cases against Los Angeles, Cambridge, Maryland, and Chicago, although in the Chicago case, discussed below, Reynolds prevented the career staff from seeking an effective remedy.

The number of cases filed, however, is not the exclusive measure of performance. Analysis of voting rights enforcement requires an examination of what positions the Department has taken in cases in which it participated to determine whether its litigation effort furthered or undermined effective voting rights enforcement.

B. Political Interference

To an unprecedented extent, particularly during its first years in office, the Reagan administration permitted political considerations to unduly influence decision-making on how voting rights enforcement should be handled. The administration allowed political meddling by prominent Southern politicians to negate or water down strict enforcement of the Voting Rights Act.[31]

In South Carolina, Reynolds blocked the filing of a friend of the court brief that he had already approved and signed for filing in a private lawsuit challenging discriminatory at-large elections in Edgefield County after protests from South Carolina Republican Senator Strom Thurmond. Minority voters represented by the ACLU contended that the at-large election system was void because it had not been precleared under Section

Table 1.

Voting Cases Filed in Federal Courts, 1981-1988.

Year	Total Cases	U.S. as Plaintiff	U.S. as Defendant
1981	152	8	9
1982	170	4	11
1983	175	1	6
1984	259	10	9
1985	281	17	5
1986	194	12	4
1987	214	12	7
1988	347	11	9
TOTALS	1,792	75	60

Source: Annual Reports of the Director of the Administrative Office of the U.S. Courts, 1981-1988, Table C 2.

5. Reynolds retrieved the brief that had already been sent to South Carolina to be filed after objections from Thurmond, an Edgefield County native who grew up and began his political career in Edgefield.[32]

In Mississippi, the Justice Department withdrew a long-standing Section 5 objection to a discriminatory municipal annexation of an almost all-white area in Jackson, after protests from Mississippi Republican Senator Thad Cochran, whose brother was a Jackson city council member, and Mississippi Representative and House Republican whip Trent Lott.[33]

In Alabama, Attorney General William French Smith ordered Justice Department attorneys to amend their complaint after Department intervention in a private lawsuit challenging at-large elections in Mobile, after Alabama Republican Senator Jeremiah Denton objected to the Department's allegation that the at-large system was designed "to maintain white supremacy." Smith also ordered an overall review of the Department's policy of intervening in private voting rights lawsuits as a result of Denton's protests.[34]

These and other examples led the Leadership Conference on Civil Rights to conclude in its 1982 report:

> But even with wide latitude given for the proper role of 'politics' in Justice Department law enforcement, a review of the record reveals that the Reagan administration's Justice Department has permitted political considerations to corrupt fair administration of the law. Members of Congress and political advisors to the administration have boldly and successfully pressured the leaders of the Department to change and weaken positions in civil rights cases. The Attorney General, his Deputy, and the Assistant Attorney General for Civil Rights have failed to resist these 'encroachments of will and power,' and have allowed this influence to circumvent the channels normally relied upon for fair decision-making.[35]

These instances set a pattern that has been followed for the past eight years in which, in these examples and other significant instances discussed below, Reynolds and other Justice Department political appointees paid more attention to the views of prominent Southern politicians--who opposed effective voting rights enforcement--than they did to the views of their own highly-experienced professional staff, black and other minority leaders, and civil rights organizations.

C. Undermining the New Section 2 Results Test

When Congress amended Section 2 of the Voting Rights Act in 1982, it made it clear that in determining whether or not there was a violation, courts were to look at "the totality of circumstances," particularly whether or not there was racially polarized voting and the extent to which minority candidates were successful in getting elected to office under the challenged system. Congress indicated that the fact that on occasion some minority candidates were elected, however, was not enough to preclude a successful Section 2 claim.[36]

In the first--and most important--case to reach the Supreme Court on the proper interpretation of the new Section 2, *Thornburg v. Gingles*,[37] decided in 1986, the Justice Department attempted to undermine and limit the effective implementation of the new legislation. The three-judge district court in the *Gingles* case made detailed findings that at-large voting in multimember legislative districts in North Carolina diluted black voting strength and violated Section 2.[38] Despite these findings, on appeal to the Supreme Court the Justice Department filed an unprecedented friend of the court brief on behalf of North Carolina asking the Supreme Court to reverse the district court's rulings.

The Justice Department's position in this important case represented a major break from prior practice. This is the first major case in which the Department--which has the statutory responsibility for enforcing the Act--sided with a Southern state covered by the special enforcement provisions of the Act to seek reversal of district court findings of voting discrimination. The extreme nature of the positions taken by the Department in this case is highlighted by the fact that the Department's position was opposed by North Carolina Governor James Martin, the Republican

National Committee, and the principal co-sponsors and supporters in Congress of the 1982 amendment to Section 2, all of whom filed *amicus curiae* briefs urging the Supreme Court to affirm the district court's decision. The congressional brief was especially significant because it was signed by a bipartisan group of Senators and Representatives that included not only leading liberals, such as Senator Edward Kennedy and Representative Peter Rodino, but also moderates and conservatives such as Senators Robert Dole, Dennis DeConcini, Charles Grassley, and Representative James Sensenbrenner, ranking minority member of the House Judiciary subcommittee.

In the Justice Department brief, which was signed both by Acting Solicitor General Charles Fried and by Reynolds, the Department disparaged the committee reports reflecting the congressional intent when the Act was extended and advanced arguments that had been used by defense counsel in the past to undermine Section 2. First, the Department argued that the Supreme Court should give little weight to the report of the Senate Judiciary Committee in interpreting the legislative intent, arguing that it represented the views of only "one faction in the controversy."[39] The Supreme Court dispensed with this argument in a footnote, ruling that it has "repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill."[40]

Contrary to the intent of Congress in enacting the new law, the Justice Department argued that the critical issue of racially polarized voting could not be proved merely by showing a high correlation between the race of the voters and the votes for candidates, but required proof of racial intent on the part of the voters.[41] The Department also argued that the occasional election of some black candidates completely negated a Section 2 claim.[42] If these arguments had been accepted, they would have seriously undermined, if not completely curtailed, efforts to eliminate racially discriminatory election systems. The Supreme Court unanimously affirmed the district court's decision (except for one district in which black voters had achieved proportional representation), rejecting the Justice Department's bizarre arguments.

D. Hostility to Effective Remedies for Minority Vote Dilution

In significant instances, the Justice Department also opposed the implementation of an effective remedy, once a voting rights violation has been found. The remedy issue is critically important because equal voting rights cannot be completely vindicated unless an effective remedy is put in place. Because most Section 2 cases are settled or won on the issue of liability, the remedy stage has become the most critical aspect of most Section 2 litigation.

1. *Opposition to race-conscious remedial redistricting plans.*

The Justice Department under Reynolds in significant instances opposed race-conscious remedies involving the creation of black or Hispanic majority districts that are 65 percent or more black or Hispanic as relief for voting rights violations. This is important; case after case has shown that when--because of past discrimination--minorities are disproportionately under voting age, underregistered, and turn out to vote at lower rates than whites, districts frequently must be 65 percent or more minority for minority voters to have an equal chance at electing candidates of their choice.[43]

The Justice Department opposed the creation of remedial districts that had more than just black population majorities in the Mississippi congressional redistricting case and the Chicago city council redistricting case. In the Mississippi congressional redistricting case, *Jordan v. Winter*,[44] the Department lodged a Section 5 objection to a congressional redistricting plan that divided up the heavily-black Delta area of the state, and private plaintiffs filed suit for a remedial court-ordered plan. The district court adopted a new plan that reunited the Delta area into one district. But that district was only 53.77 percent black in population and 48 percent black in voting age population, ensuring that white voters would retain political control of the district. Plaintiffs appealed to the Supreme Court, but the Justice Department in its *amicus curiae* brief argued that the lower court's plan was sufficient as a remedy: "The [court-ordered] plan reunites the Delta. No more was required by the Attorney General's objection to [the legislature's gerrymander]."[45]

The Supreme Court vacated the district court's decision and remanded the case for further consideration in light of the 1982 amendment to Section 2 of the Voting Rights Act. On remand, the district court held that its own prior plan--which the Justice Department supported in its Supreme Court brief--was racially discriminatory and violated Section 2. The district court then adopted a new plan that substantially increased the black percentage of the Delta district. In 1986 Mike Espy was elected from that district to become the first black member of Congress from Mississippi in this century.

Similarly, in the Chicago city council redistricting case, *Ketchum v. Byrne*,[46] black and Hispanic voters, joined by the Justice Department as plaintiff-intervenor, challenged a new redistricting plan that reduced the number of majority black wards from nineteen to seventeen and gerrymandered Hispanic neighborhoods. The district court found a Section 2 violation and adopted a remedial plan that increased the number of wards in which blacks and Hispanics had simple voting age population majorities, but left many of plaintiffs' complaints of gerrymandering unaddressed.

The minority-voter plaintiffs appealed. But Reynolds overruled the recommendation of his staff attorneys, and refused to authorize a Justice Department appeal, apparently concluding that the relief granted by the district court was sufficient. On appeal the United States Court of Appeals for the Seventh Circuit reversed, holding that the district court erred in rejecting plaintiffs' requests to create 65 percent black and Hispanic wards: "There is simply no point in providing minorities with a 'remedy' for the illegal deprivation of their representational rights in a form which will not in fact provide them with a realistic opportunity to elect a representative of their choice."[47] The Seventh Circuit ordered that the district court "seriously consider " adopting a "corrective" to adjust for lower-minority voting-age population, voter registration and turnout--either the "widely accepted 65 percent guideline" or another corrective based on reliable data--to create "super-majorities" needed "to provide *effective* majorities" for minority voters.[48]

When the Chicago city council filed a petition for certiorari in the Supreme Court, the Justice Department filed a brief opposing Supreme Court review as premature, but nevertheless expressed "serious reservations" concerning the court of appeals' endorsement of 65 percent minority districts for going too far to protect minority voting rights. In rhetoric reminiscent of the language employed by the opponents of the Section 2 amendment in 1982, the Department contended:

> . . . [T]he court of appeals' presumptive requirement of super-majority black and Hispanic wards fails to distinguish between the need to remedy present-day obstacles to political participation by minority group members and an unalloyed desire to protect them from defeat at the polls. The focus of amended Section 2 is not on guaranteed election results, but rather on securing to every citizen the right to equal 'opportunity to participation in the political process' (42 U.S.C. 1973).[49]

The Supreme Court denied the petition for certiorari, and the new redistricting plan adopted on remand resulted in the election of a an increased number of minority aldermen sufficient to give Chicago Mayor Harold Washington his first working majority on the city council.

The Department's opposition to effective voting majorities for minority voters had critical consequences for minority political participation. If the Justice Department's position on the proper remedy for the voting rights violations found in those cases had been adopted, Mike Espy would never have been elected as Mississippi's first black member of Congress since Reconstruction, and Chicago Mayor Harold Washington would never have gained a working majority on the Chicago city council.

Despite the Seventh Circuit's ruling in the Chicago case, Reynolds continued to argue that election districts should not be drawn to compensate for disproportionately low voting age population, registration, and turnout among minority voters. In an unsolicited 1985 letter to a district court in Florida, Reynolds told the court that, in the context of Section 5 review of redistricting plans, the Justice Department has no 65 percent rule of thumb for evaluating redistricting plans.

Reynolds wrote that "no attempt is made to add arbitrarily increments of five percentage points each to compensate for age, registration, and turnout differences," and that the Department has concluded in individual cases that districts significantly less than 65 percent minority "are racially fair districts."[50]

2. *Support for retention of discriminatory at-large seats.*

In cases in which at-large voting systems have been struck down for dilution of minority voting strength, the Justice Department under Reynolds supported "mixed" remedial plans containing both at-large seats and single-member districts despite district court findings that at-large elections dilute minority voting strength.

In the Alabama lawsuit challenging at-large county commissioner elections, *Dillard v. Crenshaw County*,[51] the district court rejected one county's proposed remedy for discriminatory all at-large elections that would have allowed five commissioners to be elected from districts and one at-large. The court held that the one at-large seat violated Section 2 because it excluded black representation tionand merely perpetuated the discrimination of the prior, all at-large system.

In the county's appeal to the Eleventh Circuit, the Justice Department--which previously had not participated in the case--filed a friend of the court brief siding with the county and contending that the district court's decision should be reversed because, even with the one at-large seat, black voters would be given proportional representation under the county's plan.[52] Reynolds' position in the *Dillard* case is ironic, given his position expressed in his 1982 opposition to amending Section 2, that the question of proportional representation tion should play no role in determining whether Section 2 is violated. The Eleventh Circuit affirmed the district court's findings and rejected the Justice Department's argument: "This Court cannot authorize an element of an election proposal that will not with certitude *completely* remedy the Section 2 violation."[53]

The Justice Department's attempts to block effective remedies for voting rights violations were not successful, but their efforts had the potential for seriously undermining the effective enforcement of the Voting Rights Act.

VI. Retreats and Defaults in Section 5 Enforcement

Since 1969, when the Supreme Court held that the federal preclearance requirement of Section 5 covered all types of voting law changes,[34] Section 5 has been "the most frequently used portion of the Voting Rights Act" to protect against racial discrimination in voting.[35] Section 5 currently requires nine states and parts of seven others with a past history of voting discrimination to submit all voting law changes adopted after 1964 (after 1972 for some jurisdictions not covered until that date), for preclearance by the Justice Department or the District Court for the District of Columbia. Section 5 places the burden of proof on the submitting jurisdiction to prove that the change is not racially discriminatory in purpose or effect.

Most jurisdictions have bypassed the judicial process and have submitted their voting law changes for administrative review by the Justice Department. Each year the Justice Department's Voting Section reviews an average of 4,000 submissions containing an average of 13,000 voting law changes, and since 1965 the Department has lodged Section 5 objections to more than two thousand discriminatory voting law changes.[36] Most Section 5 objections have been lodged against discriminatory municipal annexations (1,088), discriminatory changes in the method of electing officials (451), and discriminatory redistricting plans (248).[37] Once the Justice Department has interposed a Section 5 objection to a submitted change, that change cannot be implemented unless and until the state or locality files a declaratory judgment lawsuit in D.C. District Court and obtains court approval of the change.

Even under the Reagan administration, Section 5 served as an effective barrier to the implementation of discriminatory voting law changes. After the 1980 Census, the Justice Department objected to new congressional redistricting plans and/or new state legislative reapportionment plans in almost every covered state. The Department also objected to large numbers of redistricting plans at the county and city levels, including the New York city council redistricting plan and more than

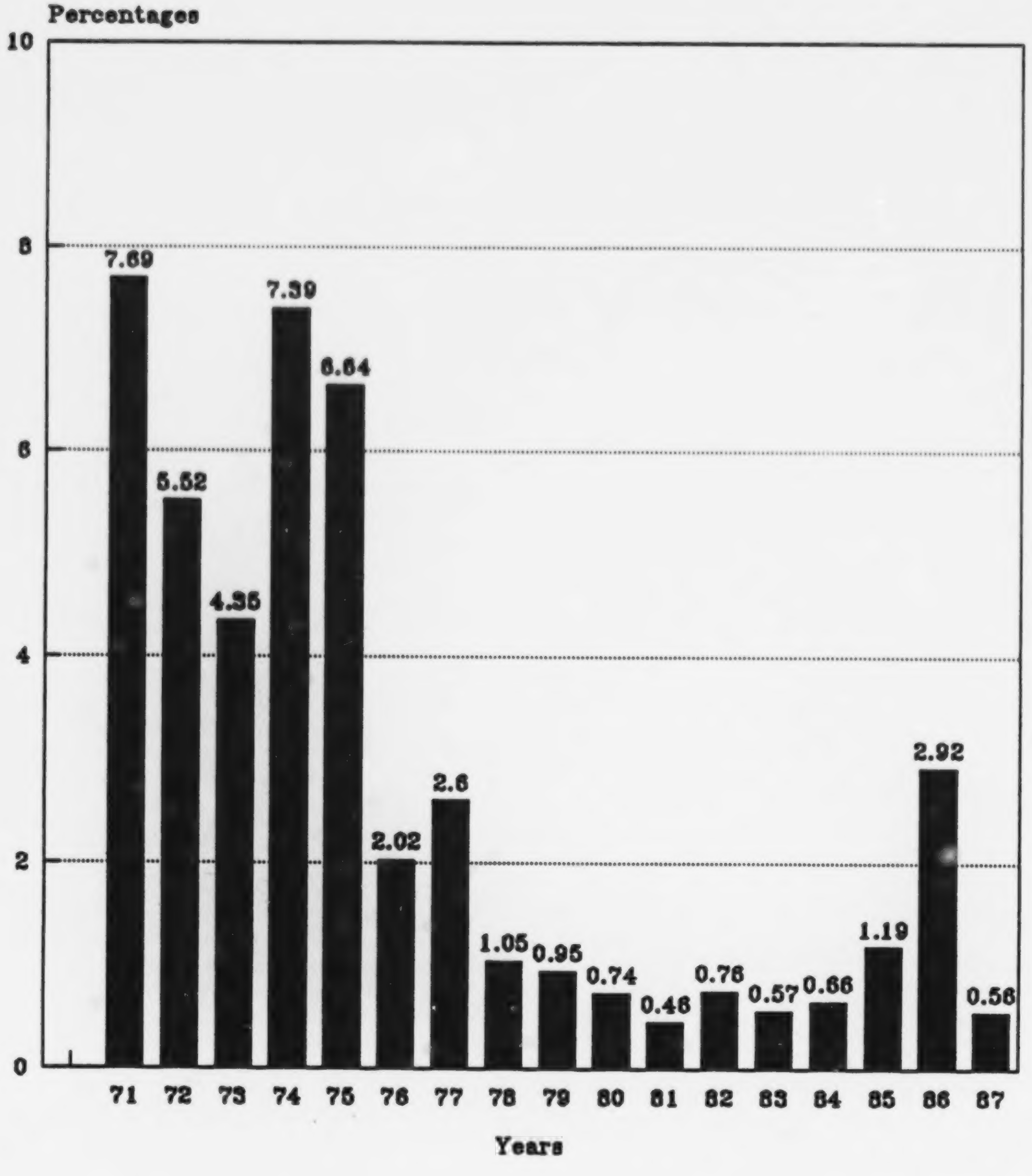
Table 2.

Number of Voting Law Changes Submitted Under Section 5, Number of Changes Receiving Section 5 Objections, and Objection Rate by Year, 1971 to 1987.

Year	Number of Submited Changes	Number of Objections	Objection Rate (%)
1971	1,118	86	7.69%
1972	942	52	5.52%
1973	850	37	4.35%
1974	988	73	7.39%
1975	2,078	138	6.64%
1976	7,472	151	2.02%
1977	4,007	104	2.60%
1978	4,675	49	1.05%
1979	4,750	45	0.95%
1980	7,340	54	0.74%
1981	7,131	33	0.46%
1982	14,287	109	0.76%
1983	12,416	71	0.57%
1984	16,489	109	0.66%
1985	14,418	172	1.19%
1986	21,898	639	2.92%
1987	15,306	85	0.56%

Source: Justice Department statistics

Section 5 Objection Rate by Year, 1971 to 1987



Source: Justice Department Statistics

20 county redistricting plans in Mississippi.[58] In addition, the Department protected minority voting rights by resisting Section 5 declaratory judgment actions in the D.C. District Court, especially in the Georgia congressional redistricting case, which resulted in the election of black Representative John Lewis from Georgia, and in the South Carolina state senate redistricting case.

But the number of Section 5 objections in the past eight years should not be allowed to obscure the fact that under the Reagan administration the Justice Department defaulted on effective Section 5 enforcement by objecting to voting law changes at a significantly lower rate than prior administrations, by failing to object to discriminatory voting law changes that should have been blocked, by attempting to dilute the scope and applicability of the Section 5 preclearance requirement, and by attempting to dilute the Section 5 regulations.

A. Lower Rate of Section 5 Objections

From 1981 to the end of 1987, the last full year for which statistics are available, the Justice Department lodged Section 5 objections to 1,218 voting law changes submitted for preclearance.[59] However, looking at the number of changes objected to per year as a percentage of the number of submitted changes, the rate of Section 5 objections substantially declined under the Reagan administration.

As the data on Table 2 show, for the ten-year period from 1971 to 1980, which covers both the second term of the Nixon administration, the Ford administration, and the Carter administration, the average rate of Section 5 objections was 3.87 percent per year, with the percentage of objections ranged from a low of 0.46 percent to a high of 7.69 percent. For eight of the ten years, the objection rate was over 1 percent and for five of the ten years it was over 5 percent.

In contrast, during the first seven years of the Reagan administration, the average annual rate of Section 5 objections was only 1.02 percent--less than one-third the prior rate. The percentage of objections never exceeded 2.92 percent, and the objection rate exceeded 1 percent of the submitted changes for only two of the seven years. The decreased rate of Section 5 objections is most pronounced for the four-year period from 1981 to 1984--the period when most covered states and localities adopted redistricting plans following the 1980 Census--when it reached an all-time low of an average rate of 0.61 percent per year.

To be sure, the number of submitted changes has significantly increased, and Section 5 may be deterring covered states from adopting new discriminatory voting systems. But an analysis of the Justice Department's Section 5 enforcement policies under the Reagan administration shows that lack of vigorous enforcement was a substantial contributing factor to this substantially lower rate of Section 5 objections.

B. Undermining Administrative Enforcement of Section 5

Section 5 gives the Attorney General the power to block, by Section 5 objections, discriminatory voting law changes. This power has been delegated to the Assistant Attorney General in charge of the Civil Rights Division. Since the Assistant Attorney General's interpretations of Section 5 and his failure to object to a change generally are unreviewable in court proceedings, the quality of Section 5 enforcement depends on the Assistant Attorney General's exercise of this discretionary responsibility.

In numerous instances, Reynolds approved racially discriminatory voting law changes against the recommendations of his own staff, some of which later were struck down by the courts, precleared discriminatory voting laws that had been objected to by prior administrations, adopted restrictive interpretations of the scope of Section 5 and of his enforcement responsibilities that undermined effective Section 5 enforcement, precleared discriminatory municipal annexations under a rule permitting *de minimis* discrimination, and approved voting law changes that were part of discriminatory election systems which Reynolds himself then sued to strike down.

1. Approving discriminatory voting law changes.

In significant instances Reynolds precleared under Section 5 racially discriminatory voting law changes that subsequently were challenged in private voting rights lawsuits and struck down by the courts for violating the protection of the Voting Rights Act.

2. Major v. Treen.[60]

In 1981 the Louisiana Legislature, under pressure from Republican Governor David Treen not to create a majority black district, adopted a congressional redistricting plan containing a duck-shaped district in New Orleans that sliced through every predominantly black precinct and created two white majority districts. Reynolds' staff received over one hundred letters and comments from black leaders and voters urging the Department to object to the plan. After an investigation, the staff recommended that Reynolds object on the ground that the gerrymander was racially motivated. However, after meetings with Governor Treen in Louisiana, and numerous telephone conversations with Treen, Reynolds overruled the staff recommendation and approved the "Donald Duck" plan. Black voters then filed a private lawsuit challenging the plan, and a three-judge district court held that the plan was racially discriminatory and violated the rights of black voters protected by Section 2 of the Voting Rights Act.

3. Gingles v. Edmisten.[61]

Following Section 5 objections to House and Senate legislative reapportionment plans adopted in 1981, the North Carolina legislature adopted revised plans. In two districts in counties covered by Section 5, the revised plan submerged concentrations of black population in at-large voting in a multimember House district (House District 8), and sliced up black population concentrations large enough to create a majority black district in a single-member Senate district (Senate District 2). Despite the evidence that the revised plans diluted black voting strength in those districts, Reynolds precleared them under Section 5.

In a private lawsuit filed by black voters, the three-judge district court ruled that five House districts and two Senate districts--including the two districts that Reynolds had precleared--were racially discriminatory and violated Section 2 of the Voting Rights Act. The court found that a black population concentration large enough to create a majority black single-member district was diluted in at-large voting in House District 8, and that a black concentration large enough for separate representation was split up in Senate District 2, that there was extreme racially-polarized voting in those districts, and that no black legislators had been elected from those districts. The district court's findings that those districts were racially discriminatory were so convincing that the state did not even contest them in its appeal to the Supreme Court in *Thornburg v. Gingles*.

4. Buskey v. Oliver.[62]

In 1981, the Montgomery, Alabama city council adopted a new redistricting plan that reduced the black percentage in the district represented by black leader Joe Reed by 16.2 percentage points. At the time, Montgomery Mayor Emery Folmar stated that he wanted a plan that would make it difficult for Reed to be reelected yet still withstand a court challenge.

In January, 1982, Reynolds lodged a Section 5 objection to the plan because it reduced black voting strength in Reed's district. But, after telephone conversations with Folmar, Reynolds reconsidered and withdrew his Section 5 objection a month later.

Black voters then challenged the plan in district court, and the court held that the plan violated the Voting Rights Act because of its retrogressive effect and because it was "purposefully designed and executed to decrease the voting strength of the black electorate in district 3."

5. Nisby v. Commissioners Court of Jefferson County.[63]

In 1981 the county commissioners court of this Texas county adopted a new county redistricting plan for its four election districts that fragmented the heavy black population in the City of

Beaumont almost equally between two districts, both of which were predominantly white. The result was to perpetuate the all-white commissioners court, and to exclude any possibility of black representation in this 28-percent black county. Despite evidence of racial gerrymandering in the new plan, Reynolds precleared the plan when it was submitted to him for Section 5 preclearance. In a subsequent private lawsuit, the district court found that on the totality of the circumstances, the gerrymandered plan denied black voters equal access to the political process in violation of Section 2 of the Voting Rights Act.

No prior administration had as many voting law changes--that were precleared under Section 5--struck down for racial discrimination in subsequent voting rights litigation. Several factors appeared to be involved. First, in a great number of cases, Reynolds overruled the recommendations of his professional staff--who conducted the investigations and who had the greatest knowledge of the facts of each case--in deciding not to lodge a Section 5 objection. The evidence from Reynolds' confirmation hearings on his appointment to be Associate Attorney General in 1985, indicates that from 1981 to 1985 there were at least thirty instances in which Reynolds rejected staff recommendations to object in preclearing submitted changes.[64] Second, in at least two of the examples cited above, involving the Louisiana congressional redistricting submission and the Montgomery, Alabama, city council redistricting, Reynolds appears to have given greater weight to his personal contacts with white Southern politicians, and to satisfying their interests, than to the facts presented or to the recommendations of his career staff. This also appears to have been a factor in Reynolds' decision to withdraw a Section 5 objection already lodged in Greene County, Alabama, that was successfully challenged in *Hardy v. Wallace*, discussed below. Third, Reynolds appears to have adopted an unnecessarily restrictive standard in reviewing Section 5 submissions that focused largely on whether the change was adopted for a discriminatory intent, rather than on its discriminatory effect. Reynolds' efforts to limit Section 5 objections based on discriminatory effects are discussed below.

6. *Approving changes previously objected to.*

In significant instances, Reynolds failed to follow the precedents established in previous administrations and precleared voting law changes that previously had been objected to.

In 1966, Mississippi--as part of its massive resistance to the passage of the Voting Rights Act--enacted a statute allowing counties to switch from elected to appointed county school superintendents to prevent the election of black school superintendents.[65] This statute was involved in one of the three Mississippi cases that went to the Supreme Court in *Allen v. State Board of Elections* (in 1969) in which the Court held that this type of change was covered by Section 5. When the change was submitted for Section 5 preclearance, the Justice Department blocked its implementation by a Section 5 objection in 1969.[66] Despite this prior objection, when the Mississippi Legislature enacted a new statute authorizing county referendums on switching to appointed county school superintendents in 1986, Reynolds precleared it under Section 5.[67]

Similarly, six times, between 1969 and 1983, the Justice Department objected under Section 5 to Mississippi laws establishing uniform qualifying deadlines for party and independent candidates that deprived independent candidates (most of whom were black) of the advantage they had under existing law of not qualifying to run until after the party primaries.[68] Nonetheless, in January 1987, Reynolds precleared a new Mississippi statute containing this uniform qualifying deadline provision.[69]

7. *Restricting what changes are covered by Section 5.*

The Department adopted or acquiesced in restrictive interpretations of the scope or applicability of Section 5 that would have undermined the section's effectiveness as a barrier to discriminatory voting law changes. For example, in the case involving the Greene County, Alabama, racing commission, Reynolds first objected to a voting law change that transferred the power to appoint members of the racing commission in this predominantly-black county from the county's legislative delegation to Alabama Governor George Wallace. After protests from white Alabama politicians, Reynolds withdrew the objection, and, contrary to a prior D.C. District Court decision,[70] ruled that the change was not even covered by Section 5. In *Hardy v. Wallace*[71] a three-judge district court ruled that Reynolds' interpretation was wrong and enjoined implementation of the change pending further Section 5 review.

In another example, in *Blanding v. Dubose*,[72] a Section 5 enforcement lawsuit to enjoin a change for lack of Section 5 preclearance, a three-judge district court in South Carolina rejected arguments by private plaintiffs and the Justice Department that a referendum adopting at-large election had not been precleared. The court ruled that when the county sent the results of the referendum to the Justice Department, this constituted a new Section 5 submission of a change that the Department already had objected to. The court held that the Department's failure to lodge a new Section 5 objection meant that the county could implement its new at-large election system.

This case had great potential for undermining Section 5 enforcement because it meant that covered jurisdictions could slip through changes covered by Section 5 simply by failing to call the Justice Department's attention to the fact that the information contained in correspondence with the Department constituted a new Section 5 submission. Despite the fact that the district court held against the Department, Reynolds decided not to appeal--in effect, acquiescing in this restrictive interpretation. The private plaintiffs did appeal, and the Supreme Court reversed the district court's ruling.

8. De minimis rule for municipal annexations.

In the past, the largest number of Section 5 objections have been lodged against racially discriminatory municipal annexations that reduced the minority population and made it more difficult for minority voters to elect candidates of their choice. During his tenure, Reynolds reduced the effectiveness of Section 5 as a barrier to discriminatory annexations by apparently adopting a *de minimis* rule that allowed approval of annexaions that reduce the minority population percentage by less than 3 percent. This rule ignored the cumulative effect a series of annexations can have over time, and also ignored the fact that elections can be won or lost by 3 percent of the votes.

9. Preclearing the change, but suing the jurisdiction.

As discussed further below, Congress, in 1982, expressed its intent that Section 2 standards should be incorporated in Section 5 review of voting law changes, and Reynolds agreed--except for a brief period of resistance--and ultimately adopted this standard in the Justice Department's Section 5 regulations. But Reynolds appears--in some instances--to have ignored Congress's and his own policy.

In these instances, jurisdictions covered by Section 5 submitted voting law changes that were part of racially discriminatory at-large election systems. Instead of objecting to the changes as his staff recommended, Reynolds precleared the voting law changes. But then, he informed the submitting jurisdictions their election systems violated Section 2--sometimes in the same letter preclearing the change--and sued the jurisdictions for violating Section 2.

When the Wilson County, N.C., Board of Education submitted for Section 5 review a change that consolidated three school districts, and provided for countywide school board elections with staggered terms of office, the staff of the Voting Section recommended that Reynolds object because the staggered terms provision, together with the at-large election of school board members, precluded the election of candidates favored by black voters. In fact, a district court in North Carolina already had ruled that countywide elections for the Wilson County Commission unlawfully diluted black votes.[73] Instead of objecting to the change, Reynolds overruled the staff objection and precleared the change. But in his letter preclearing the change, Reynolds took note of the district court ruling against countywide elections, and indicated that the same evidence produced in that case was equally applicable to school board elections. "For that reason," Reynolds wrote, "the Voting Section is considering the appropriateness of litigation."[74] One month later Reynolds filed a Section 2 lawsuit challenging the countywide election system he previously had precleared.[75]

Similarly, Reynolds precleared under Section 5 a redistricting of residency districts under an at-large city council voting system in Anniston, Alabama, even though he concluded that "the at-large system does not afford black citizens an opportunity equal to that afforded white citizens to participate in the political process and to elect candidates of their choice to the city council;"[76] thirty municipal annexations to Aiken, South Carolina, even though he concluded that his review "has raised concerns that the at-large method of electing the Aiken City Council, viewed in the totality of the electoral circumstances present in the city, may violate Section 2 of the Voting Rights Act. . . ;"[77] and three annexations and a reduction in the number of city council members from sixteen to eight under an at-large city council election scheme in Augusta, Georgia.[78] Following the Section 5 preclearance of these changes, Reynolds then authorized lawsuits against Aiken City, and Augusta, challenging the at-large elections systems as racially discriminatory under Section 2,[79] and Anniston voluntarily dismantled its at-large election system before being sued.

Reynolds' policy of not objecting to these changes under Section 5, but instead of filing lawsuits against these covered localities, undermined the fundamental purpose of the statute. The administrative preclearance requirement of Section 5 was enacted by Congress to eliminate the necessity of litigation. Congress determined, in the words of the Supreme Court in *South Carolina v. Katzenbach*, "that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits."[80] By preventing voting law changes from going into effect until they are proven to be nondiscriminatory, Section 5 was intended "to shift the advantage of time and inertia from the perpetrators of the evil to its victims."[81] Thus, preclearing the discriminatory voting law changes and then filing lawsuits challenging them negates the very function Congress enacted the statute to perform.

C. Diluting the Section 5 Regulations

When Congress amended Section 2 of the Act in 1982, it expressed its intent that the new Section 2 "results" standard should be incorporated in Section 5 review of new voting laws submitted for preclearance under Section 5.[82] This expression of congressional intent is important. Although the statutory language of Section 5 prohibits preclearance of any change that is not free of any discriminatory purpose or effect, the Supreme Court has narrowly limited the Section 5 "effect" standard to require a Section 5 objection only if the change is retrogressive of existing levels of minority voting strength.[83]

This means that if the preexisting election system is discriminatory, and the voting law change is equally discriminatory, then the change must be approved under Section 5 because minority voters are no worse off than they were under the prior system.[84] Applying the new Section 2 results test would allow an objection even if the new voting law is not retrogressive if the submitting jurisdiction is unable to prove that the change does not have a racially discriminatory result under Section 2.

Despite the legislative history of the 1982 amendments to the Voting Rights Act and the importance of preventing discriminatory voting changes from being implemented, Reynolds flip-flopped on whether Section 5 review should incorporate Section 2 standards.

1. *Section 2 in.*

After the 1982 Voting Rights Act amendments were passed, Reynolds, in a Section 5 lawsuit,[85] in correspondence with members of Congress,[86] and in his testimony during the confirmation hearings on his appointment to be Associate Attorney General,[87] took the position that under Section 5 the Justice Department (and the District Court for the District of Columbia) should refuse to preclear a voting law change that is discriminatory in violation of the new Section 2 "results" standard. In 1985 the Justice Department published proposed new Section 5 regulations for public comment that indicated that the Justice Department would apply the Section 2 standard in reviewing voting law changes submitted under Section 5, but which shifted the burden of proving a violation to the parties opposing the change and required them to prove a Section 2 violation "by clear and convincing evidence."[88]

Reynolds was correct to say that Section 2 standards should apply, but wrong to attempt to shift the burden of proof away from the submitting state or locality seeking approval of the change. The courts have ruled that in Section 5 proceedings, the burden of proof is on the submitting jurisdiction, both in court proceedings in D.C. District Court and in administrative review in the Justice Department, and the proposed regulation shifting the burden of proof from the submitting jurisdiction to minority voters opposing the change violated this longstanding legal standard. The proposed regulation echoed an early attempt by the Nixon administration to shift the burden of proof in Section 5 administrative proceedings to minority voters. The effort was abandoned in 1971 after the Nixon administration's views were rejected by a Federal court and criticized in congressional oversight hearings.[89]

2. *Section 2 out.*

Then, in August 1986, in a panel discussion at the annual meeting of the American Political Science Association, Reynolds reversed himself and announced a new position that the Section 2 results standard should not be considered at all in Section 5 review:

> It is now our considered view that [Section 2] would not be a permissible consideration in the preclearance process, that the voting change should still be precleared, and if there was a discriminatory result that adhered from the change, the matter should be taken to court and under Section 2 should be fully litigated through the court process.
>
> So my conclusion really is that the Section 2 change has little or no--and I really would say no--impact on the Section 5 preclearance process . . .[90]

3. *Section 2 back in.*

Reynolds' speech immediately got unfavorable headlines in the *Washington Post* ("Justice Dept. Won't Assess Possible Bias in Election Plans")[91] and prompted an outcry and letters to Reynolds and Attorney General Edwin Meese from influential members of Congress and civil rights organizations. As a result, Reynolds reversed himself once again. In the final regulations published in January 1987, Reynolds agreed that Section 2 standards should be applied in Section 5 review proceedings, and that a Section 5 objection would be lodged "to prevent a clear violation of amended Section 2."[92]

But even with this about face, and with the Section 2 results standard incorporated in the Justice Department's Section 5 regulations, Reynolds failed to vigorously enforce this new standard of Section 5 review. An analysis of Section 5 objections for 1987 and 1988 indicates that few Section 5 objections have been lodged for the stated reason that the voting law change had a discriminatory result that violated Section 2.

Other loopholes and limitations in the proposed 1985 regulations were criticized in comments submitted to the Justice Department by public interest groups and in congressional oversight hearings before Representative Don Edwards' House Subcommittee on Civil and Constitutional Rights.[93] As a result of these criticisms, some of those loopholes were rectified, but others remain in the final regulations. Section 5 is clear that new voting practices should be blocked if they have a racially discriminatory purpose *or* effect. The new regulations are deficient in providing that if there is no benchmark for determining whether a voting law change is retrogressive of existing levels of minority voting strength, then a discriminatory purpose test should be applied,[94] rather than looking for other measures of a discriminatory effect. Similarly, the 1987 regulations create a loophole in the Section 5 preclearance requirement by allowing implementation of a covered jurisdiction's preferred redistricting plan without Section 5 preclearance if done by court order on an interim basis.[95]

VII. Conclusions

The right to vote is fundamental to our democratic society, and federal protection for the right to vote should be vigorously enforced. Soon after the Voting Rights Act was passed, the Supreme Court declared that it was intended to "banish the blight of racial discrimination in voting,"[96] and should be liberally interpreted to give it "the broadest possible scope."[97] Contrary to this mandate, the Justice Department--under the Reagan administration--adopted policies and took positions that restricted the protection of the Voting Rights Act and, in some instances, nullified its guarantees.

For the past eight years, civil rights groups and minority voters have been reluctant to seek the assistance of the Justice Department in combating voting rights discrimination. Civil rights advocates have been wary in referring voting cases to the Department and in inviting the Department to intervene, or to file friend of the court briefs, for fear that the Department will undercut their position by espousing an inadequate remedy or even by filing a brief supporting the opposing side. Similarly, they have had to think twice about investing their time and energy in urging the Department to lodge a Section 5 objection to a discriminatory voting law change for fear their presentation of the facts and the law will be completely disregarded at the level at which the final decision is made. As one veteran civil rights lawyer recently put it, during the past eight years, that Department has been "at best, a loose cannon, at worst, the enemy."

The danger is that the restrictive policies of the last eight years will encourage states and localities seeking to limit minority political participation to persevere in their efforts, and to readopt discriminatory voting schemes that have been struck down in the past. This seems to have occurred to some extent in Mississippi, where discriminatory voting laws that were struck down by Section 5 objections in prior administrations have been reenacted by the state legislature and precleared under the Reagan administration.

Despite all this, the past administration was largely unsuccessful in its efforts to restrict voting rights protection. The administration lost its battle to prevent Congress from overruling the *Mobile* decision through legislation, the Supreme Court rejected its extreme arguments in the *Thornburg v. Gingles* case, and the federal courts generally have refused to accept administration arguments that would deprive minority voters of effective remedies. Although the Department has caused great damage by granting administrative preclearance to discriminatory voting law changes under Section 5, in the most outrageous instances that damage was limited when the federal courts subsequently struck down those discriminatory schemes in private lawsuits. Similarly, the administration's efforts to dilute the Department's Section 5 regulations were reversed after a firestorm of criticism from members of Congress and civil rights organizations.

The principal tasks of the new administration are to restore confidence in the Justice Department as the chief enforcer of the nation's voting rights laws, to dispel the notion that discriminatory voting laws and practices will get a sympathetic hearing in the Justice Department, and to address unresolved problems of vote denial and discrimination.

VIII. Recommendations

1. The new administration should give its full backing and support to the Universal Voter Registration Bill to remove the remaining barriers that restrict voter registration, by providing for mail-in registration, election day registration, and registration with state and local agencies serving members of the public.

2. The Justice Department should substantially increase its caseload of Section 2 cases to mount an all-out, national attack on voting structures that deny minority voters an equal opportunity to elect candidates of their choice. The Department under the new administration should reorder its priorities to protect and vigorously enforce the voting rights of minority voters instead of reiterating arguments and adopting restrictive policies that would unduly undermine or limit the scope of the Voting Rights Act's protection.

3. The Justice Department should abandon its policy of seeking or supporting restricted relief in voting rights cases, should not hesitate to support districts that are 65 percent or more minority where necessary to give minority voters equal opportunities to elect candidates of their choice, and should not support mixed systems under which some officials are elected at-large, and others by district, as a remedy for all at-large elections where the mixed systems limit the opportunities for minority voters to elect candidates of their choice.

4. The Justice Department should revise its Section 5 regulations clearly and concisely to require a Section 5 objection to any voting law change regarding which the submitting jurisdiction is unable to prove that the change does not have a racially discriminatory effect, including any change regarding which the submitting jurisdiction is unable to prove that the change does not violate Section 2 of the Voting Rights Act, and vigorously enforce that requirement in administrative preclearance proceedings. If necessary, the Department should ask the Supreme Court to overrule or limit its decision in *Beer v. United States* that restricts the Section 5 effect

standard to changes that are retrogressive of existing levels of minority voting strength and ignores the question of whether the benchmark for determining this retrogression is itself discriminatory.

5. The Justice Department should abandon any *de minimis* rule in reviewing voting law changes under Section 5--particularly in the area of municipal annexations--under which any changes that are only slightly discriminatory are approved.

6. The Justice Department should enhance its program of monitoring and enforcing election day assistance to illiterate voters through its federal observer program and election-day monitoring by Department attorneys. The Department should oppose any efforts to limit the scope of Section 208 of the Voting Rights Act, which allows illiterate voters assistance of their choice, and should particularly resist efforts to limit Section 208 to federal elections.

7. The Justice Department should begin preparations now to review under Section 5 the thousands of redistricting plans, at the state and local levels, that will have to be adopted by covered jurisdictions following publication of 1990 Census data. In particular, the Department should devise a computerized data base and computer programs for complete and systematic analysis of new plans, and for analysis of increases in minority populations in particular areas in which new minority districts can be created. This is necessary to avoid start-up delays in preclearing new plans that will have to be used in elections directly following publication of 1990 Census data.

8. The Justice Department should initiate criminal prosecutions for repeated, or particularly flagrant, violations of the Voting Rights Act by officials of covered jurisdictions, including the repeated adoption of discriminatory voting laws and failure to submit for preclearance voting law changes that clearly are covered by the Section 5 preclearance requirement.

9. Recently, some courts have restricted the relief available under the Voting Rights Act by prohibiting injunctions against impending at-large elections, even though the judicial standards for obtaining preliminary or permanent injunctive relief have otherwise been met.[98] The Justice Department should make a concerted effort to ensure that once plaintiffs in voting rights cases have demonstrated an infringement of minority voting rights, no further elections should be held under the discriminatory voting system.

CHAPTER XXII

RIGHTS OF INSTITUTIONALZED DISABLED PERSONS

by Professor Robert D. Dinerstein

I. Introduction

In one version of an oft-quoted line, it has been said that "[o]ne measure of a nation's civilization is the quality of treatment it provides persons entrusted to its care."[1] While conditions within this nation's mental health and mental retardation institutions have undoubtedly improved within the last fifteen years, it remains painfully true that institutional conditions continue to be unacceptable for large numbers of institutionalized persons. Widespread physical abuse of patients and residents by staff and other residents; inappropriate use of psychotropic medications; improper use of seclusion rooms and physical restraints; lack of privacy; deteriorated buildings; insufficient numbers of adequately trained professional and non-professional staff; lack of meaningful training programs; and improper institutional placement of individuals fully capable of functioning in less restrictive community-based facilities, are just some of the problems that continue to plague all too many mental health and mental retardation institutions.[2]

In passing the Civil Rights of Institutionalized Persons Act [hereinafter "CRIPA"][3] in 1980, Congress praised the role of the Department of Justice in seeking to ameliorate these deleterious conditions and fully expected it to continue its efforts to advocate forcefully for the rights of institutionalized persons. Unfortunately, the Department's track record in this area, under its assistant attorney general for civil rights, William Bradford Reynolds, has been anything but a positive one. As will be discussed in greater detail below, the Reagan Justice Department has retreated from its historic commitment to the protection of the civil rights of institutionalized disabled persons in the following ways:

1. The Department reversed positions in several landmark mental disability cases, thereby jeopardizing the hard-fought gains obtained in those cases;

2. Especially in the early years of the Reagan administration, the Department simply declined to enforce CRIPA by failing to bring any lawsuits under the statute. No lawsuit was filed under

CRIPA in a mental disability institutional case until April 1984;

3. In those investigations that the Department did initiate, it took an inordinate amount of time to conduct and complete them, thereby allowing seriously harmful institutional conditions to persist for unacceptably long periods of time;

4. The Department has refused to pursue the protection of certain rights within the cases or investigations it has brought, especially rights related to the placement of individuals in less restrictive community-based facilities. The Department has based its limited view of the nature of the rights of institutionalized persons on an overly restrictive reading of the Supreme Court case of *Youngberg v. Romeo*.[4] The Department has also eschewed the use of various monitoring techniques well-tested in other cases because of a misplaced concern with their supposed intrusiveness into the operation of state institutions;

5. In the consent decrees that the Department has filed under CRIPA, it has followed a cookie-cutter approach in which it has sought essentially the same relief in every case. Moreover, it has resisted anything but the most narrow articulation of institutionalized persons' rights in the various decrees that it has negotiated;

6. Advocacy groups, which were active in supporting passage of CRIPA and often sought the assistance of the Department in cases they brought, now view the Department as a virtual adversary. The Department has opposed the intervention of advocacy groups in two of its CRIPA cases, and was sued by another group for not including it in negotiations it was holding with state officials in another case. As a result, crucial cooperation between different supporters of institutionalized persons is almost non-existent;

7. The Special Litigation Section of the Civil Rights Division (the section charged with enforcement of CRIPA) has been decimated by the loss of experienced personnel, reduction in authorized strength, and vacancies. There has been a substantial loss of institutional memory and experience in the section that has made problematic even the limited enforcement of CRIPA that the Department has undertaken;

8. Finally, the serious problems identified above have served to obscure some of the problems with CRIPA itself that a new administration and Congress should address as soon as possible in the next congressional session.

Unlike its pronouncements in some other areas of civil rights enforcement, the Reagan administration did not take office with a clearly articulated agenda to overturn the rights of, or remedies for, institutionalized persons that had been recognized by previous administrations, Congress, the courts, and the public. Nevertheless, as a result of its activities and inaction, the result in this--as in other civil rights areas--was the same: a group of citizens that had looked to the Department of Justice as its principal protector[5] could only conclude by the end of the Reagan administration that the Department had become its enemy.

II. The Role of the Justice Department in Litigation of the Rights of Institutionalized Disabled Persons, 1971-1980: Successful Litigation but Questionable Authority

The Justice Department first became involved in litigation on behalf of institutionalized disabled people in 1971 in connection with the landmark case of *Wyatt v. Stickney*.[6] United States District Court Judge Frank M. Johnson, Jr., invited the United States to participate in the case as a "litigating" *amicus curiae* in order to assist the court and the parties in developing the evidence on institutional conditions and presenting expert testimony on minimum standards for the care and treatment of institutionalized mentally ill and mentally retarded individuals. The shocking evidence of institutional harm and abuse led the court to declare that these institutionalized persons had the constitutional due process right to receive adequate treatment (for mentally ill patients) and habilitation (for mentally retarded residents). The court went further and promulgated a series of detailed minimum standards to effectuate these rights.[7] The Justice Department and other *amici* organizations played an active role in litigating the case, a role which won the Court's praise.[8]

Following *Wyatt*, the Department decided upon a two-prong litigation strategy designed to combat, in the most efficient way possible, the abuse and mistreatment of institutionalized people. First, as in *Wyatt*, the Department participated as a litigating *amicus curiae* or plaintiff-intervenor in a number of major institutional cases,[9] including actions challenging conditions at the Willowbrook State School for the Mentally Retarded in New York[10] and the Pennhurst State School and Hospital in Pennsylvania.[11] The Justice Department's role in these cases was critical. Often it was the only party or entity with sufficient financial and technical resources to marshal the substantial evidence of institutional harm and abuse that was the predicate for judicial intervention. Attorneys from the Civil Rights Division's Special Litigation Section[12] obtained the services of expert witnesses to tour institutions and testify about the conditions they observed; took numerous depositions of the institutions' line-level and management staff in order to develop a complete picture of the day-to-day operations of these closed, total institutions; examined, with the assistance of the Federal Bureau of Investigation, massive amounts of institutional documents that both confirmed the lack of appropriate treatment services, apparent to any visitor who could see the large numbers of idle, unattended residents, and documented the extent of institutional abuse and neglect that could not always be detected on an outside investigatory tour of which the institution had prior notice. The lawyers from the Special Litigation Section developed an unparalleled expertise in the nature of institutional harm and the means by which such harm could be brought to the court's attention.

The problem with exclusive reliance on the above intervention strategy, however, was that it ran the risk of concentrating governmental resources in cases which, while they addressed institutional conditions that were undeniably inhumane, had at least come to the attention of some outside advocate or group who had then filed suit. Given the nature of the institutions at issue--closed, isolated facilities containing citizens who often had little contact with their families, who had an impaired ability to communicate their complaints about the conditions under which they were kept, and who, in any event, were extremely dependent for their very existence on staff who might be the principal perpetrators of the abuse--it was plausible to conclude that the worst institutions in the country were those that had *not* come to the attention of any outside group. Thus, the Department of Justice adopted the second prong of its strategy: in the name of the United States, it filed two of its own cases against state officials charged with operation of two state mental retardation institutions.[13] Although there was no statute authorizing such action, the Department asserted that it had the inherent authority to sue to redress constitutional violations committed against its own citizens.

Unfortunately for the Department's strategy, the district courts in these two cases rejected its rationale for a nonstatutory authority to sue and dismissed the suits; these dismissals were upheld on appeal.[14] Moreover, as a result of these decisions, defendants in cases where the Justice Department appeared as a plaintiff-intervenor filed motions to dismiss as well, claiming that if the Department did not have authority to initiate suit it did not have the authority to intervene, either.[15]

Faced with judicial rejection of an important part of its litigation strategy, the Government sought enactment of a statute that would clarify its litigation status and allow it to initiate the kinds of cases in which it theretofore had intervened. Between 1977 and 1979, Congress held lengthy hearings on the proposed statute that was eventually enacted as CRIPA.[16] Witnesses chronicled the horrendous state of institutional conditions and the positive role of litigation generally, and the Justice Department's activities in particular, in bringing these conditions to light so they could be exposed and ultimately ameliorated. Supporters of the bill included mental disability advocates who argued that their organizations did not have the resources to bring substantial numbers of institutional cases and monitor the positive results obtained as a result of court orders. CRIPA was enacted into law in May 1980,[17] despite opposition led by several senators who had formerly served as their states' attorneys-general and, therefore, had defended state institutions against Justice Department intervention.

In CRIPA, Congress empowered the Attorney General to sue (either by initiating his own suit, or by intervening in private litigation) state or local facilities whenever he concluded that such facilities were subjecting their residents to a pattern or practice of "egregious or flagrant" conditions causing "grievous harm."[18] CRIPA required the Attorney General to certify that he had notified the appropriate state or local officials at least seven days in advance of his intent to commence an investigation, and that at least forty-nine days prior to filing suit he had advised these officials of the alleged unconstitutional and illegal conditions at the institutions; the facts supporting those contentions; and the minimum measures which, if taken, would remedy those conditions.[19]

The "egregious or flagrant" language and pre-filing notice requirements were not required in litigation commenced by private parties pursuant to 42 U.S.C. § 1983, but upon analysis such requirements should not have signaled a major break from such litigation. The legislative history of CRIPA made plain that the "egregious or flagrant" language was meant to describe the conditions identified in cases previously litigated by the Department, including *Wyatt* and *Pennhurst*.[20] The pre-filing requirements were not unprecedented, and, at most, were meant to address the probably disingenuous comments of some senators that state officials, in some cases, had been surprised to learn of the egregiously unconstitutional conditions that existed within their facilities. In light of later experience with CRIPA, it cannot be overemphasized that there was nothing in the statute that explicitly or implicitly suggested that investigations under the statute would take months and years to conduct. Furthermore, while Congress was under no illusions about the capacity of litigation immediately to cure all institutional ills, the Senate Judiciary Committee noted:

> Experience has shown, however, that [litigation] is also the single most effective method for redressing systematic deprivations of institutionalized persons' constitutional and Federal statutory rights. Until such time as every State and political subdivision assumes full responsibility for protecting the fundamental rights of its institutionalized citizens, the need for Federal enforcement of those rights will continue.[21]

Thus, as the Carter administration wound down, the Justice Department, through its Civil Rights Division, was poised to begin a new era of enforcement of the rights of institutionalized disabled people. Armed with a new authorizing statute, the Government would finally be able to decide which institutions to investigate and sue and which strategies to pursue within the litigation it chose to bring. Moreover, as the decade of the 1970s ended, the recognition of rights had expanded from their initial articulation in cases such as *Wyatt*. Increasingly, advocates successfully urged courts to recognize that one of the most significant harms that institutionalized persons could suffer was the harm of unnecessary institutionalization itself. Whether conceptualized in its broadest terms as a constitutional right to receive services in the setting least restrictive of individual liberty or more narrowly as an important, and perhaps essential, component of relief necessary to make whole the victims of unconstitutional conditions, this increasing focus on community placement was well-established within the lower federal courts and state statutes as the Reagan administration took office.[22]

III. The Role of the Justice Department in Enforcing the Rights of Institutionalized Disabled Persons, 1981-1988: The Department Retreats

A. The Department's Reversals of Position in Ongoing Litigation

One component of the Reagan Justice Department's effort to undercut the advances obtained by institutionalized disabled people was to reverse positions in several key cases. Interestingly enough, the catalyst for such reversals was not a case brought by the Department but rather *Youngberg v. Romeo*,[23] a Supreme Court case decided in 1982.

In *Youngberg*, the Court held that involuntarily-committed mentally retarded persons had substantive due process rights to safety, freedom from bodily restraint, and minimally adequate training necessary to implement those rights. In addition, the Court noted that defendants had conceded that institutionalized residents had a right to receive adequate food, clothing, shelter, and medical care.[24] Although in many ways a narrow decision -- the Court did not reach the questions of whether plaintiff Nicholas Romeo had a broad right to habilitation per se or a right to receive that level of training necessary to effectuate his release from institutional confinement -- *Youngberg* was nevertheless the Court's first effort to define the substantive rights of institutionalized disabled persons.[25]

Focusing on the rights of institutionalized persons, however, was only one aspect of the Court's decision in *Youngberg*. The Court stated that courts needed to balance those rights against the states' interests in operating their institutions. The expression of this balance was the notion that courts should defer presumptively to the legitimate judgments of institutional professionals; if those professionals, in fact, exercised their professional judgment in making decisions regarding institutionalized persons, plaintiffs' due process interests would be satisfied.[26] In a concurring opinion, Justice Blackmun, writing for himself and Justices O'Connor and Brennan, suggested that if a state promised its institutional residents treatment "it would be a serious question" whether the state could then, consistent with the Constitution, fail to provide it.[27] In addition, Justice Blackmun would have held that a state must preserve the basic self-care skills that residents had upon entry to the institution had the issue been clearly presented in the case.[28] Concurring in the judgment, Chief Justice Burger would have gone further than the majority, which held that the issue was not presented, and would have concluded that institutionalized persons had no broad right to habilitation per se.[29]

> *Youngberg* then was one of those decisions that provided something for everyone. Advocates for disabled people hailed it for its recognition of institutionalized persons' substantive due process rights. State administrators and institutional professionals cheered the Court's language regarding deference to professional judgment. The Court, for its part, seemingly went out of its way to issue as narrow a decision as possible, and virtually invited the lower courts and litigators to engage in a dialogue over how the balance of liberty and state interests would be struck in particular cases. It was, accordingly, reasonable to assume that the Justice Department would be part of that dialogue.[30]

A mere six days after the Court issued the *Youngberg* decision, however, William Bradford Reynolds, assistant attorney general in charge of the Civil Rights Division, delivered a pronouncement that threatened to cut short the dialogue before it began. Without consultation with staff attorneys in, or the leadership of, the Special Litigation Section, Mr. Reynolds issued an internal memorandum that purported to define the meaning of *Youngberg* and its effect on the Justice Department's litigation strategy.[31] Reynolds determined that from now on the Department would seek enforcement of only those rights explicitly recognized in *Youngberg*. Curiously, Reynolds concluded that those rights excluded consideration of the adequacy of psychological or psychiatric care. The memorandum implicitly rejected adoption of the Blackmun concurrence in *Youngberg*, let alone any constitutional theories that were left unaffected by the case.

Criticism of the Reynolds interpretation was intense. Twenty-two public interest groups attacked the Reynolds memorandum as an "unreasonably restrictive" reading of *Youngberg*.[32] The editors of the Mental Disability Law Reporter noted that:

> Much of the controversy over William Bradford Reynolds' internal memorandum has to do with the perception that the Department of Justice is pulling back from its active litigation policy on behalf of mentally disabled residents of institutions. Compared with the Carter administration, it seems fair to acknowledge that the Reagan administration is intentionally placing more importance on states' rights and, in line with states' rights, on conciliatory efforts to resolve enforcement problems in state institutions.[33]

The Department of Justice thus weighed in with its overly narrow interpretation of the *Youngberg* decision before the ink was dry. Rather than view the decision as the floor below which states could not go, Mr. Reynolds treated *Youngberg* as the ceiling above which the courts must not go. In particular, the Department's rejection of a conception of minimally adequate training that could include preservation of self-care skills, or preparation for placement outside of the institution, betrayed its fundamental lack of understanding of the nature of institutionalization and the harms it caused. Although Mr. Reynolds later argued that the memorandum's interpretation of *Youngberg* "signals no retreat in civil rights enforcement,"[34] and that "our reading of *Youngberg* suggests to us that the Constitutional rights recognized by the Court are rather extensive and encompass many, if not most, of the serious deprivations that we sought to remedy in the pre-*Youngberg* period,"[35] the Division's actions severely undercut those assertions.

As will be discussed in the next section, the Department's view of *Youngberg* had a profound effect on its enforcement of CRIPA. It also caused the Department to shift positions in several critical cases. Two of those cases are especially significant and worthy of discussion: *Wyatt v. Ireland*[36] and *Halderman v. Pennhurst State School and Hospital*.[37]

Subsequent to the court's 1972 decision in *Wyatt v. Stickney*, plaintiffs, *amici* groups and the Justice Department continued to monitor defendants' efforts to achieve compliance with the court's extensive injunctive orders. Those compliance efforts waxed and waned. In 1978, the court held a two-week hearing on defendants' compliance with the mental retardation order. Following that hearing, plaintiffs and the Justice Department conducted months of discovery regarding the state mental hospitals' compliance with the mental health orders. Plaintiffs and the Justice Department took numerous depositions of institutional staff and retained a number of experts to examine conditions within the state's facilities. At the end of the discovery period, the state conceded its noncompliance with the mental health orders. The district court determined that defendants were in noncompliance with substantial aspects of the mental retardation orders as well. It placed the state's mental health and retardation institutions into receivership in 1979, naming Governor Fob James as receiver.[38]

Creation of the receivership, however, did not solve the vexing problems of achieving compliance with the court's orders. In the 1981-82 period, plaintiffs (with decreased assistance from the Justice Department) continued to conduct compliance discovery and moved to remove the governor as receiver. But as the parties continued to battle over the state of compliance, the Justice Department began negotiations with defendant officials and their lawyers in an effort to "settle" the case. These were odd settlement discussions, however, in that plaintiffs, presumably a necessary party to any true settlement of the outstanding issues in the case, were excluded from the discussions. Nevertheless, the Department and defendants agreed to a settlement of the case that they submitted to the district court.[39]

But the Department's negotiation tactics were only part of the problem. The substance of the agreement itself reflected the Department's willingness to ignore the persistent problems of compliance with court orders and to use the *Youngberg* decision as a sword to attack what it perceived to be overly intrusive judicial involvement in the operation of state institutions. The agreement with the defendants purported to replace the *Wyatt* minimum constitutional standards--standards that ten years after their promulgation had still not been complied with--with Joint Commission on Accreditation of Hospital (hereinafter "JCAH") standards and accreditation procedures for the state's mental health facilities and Title XIX (hereinafter "Medicaid") standards and certification procedures for its mental retardation facilities. No longer would the district court be the final arbiter of compliance, the outside accreditation agencies would function in this role since achievement of accreditation or certification would "raise a strong, but not irrebuttable, presumption that the residents within these facilities are receiving constitutionally adequate care and treatment."[40] The agreement made it clear that "constitutionally adequate care and treatment" would be defined with reference to the Department's narrow view of *Youngberg*. Until compliance with JCAH and Medicaid standards were achieved, moreover, the defendants would no longer be subject to the *Wyatt* standards at all but would simply have to maintain the then current level of compliance (or noncompliance) with existing orders.[41]

Because the plaintiffs did not agree with the proposal, it was never actually used to settle the case although it did serve to remove the Justice Department from the litigation, thus ending the Department's ten-year connection with this landmark case. Subsequently, plaintiffs did settle the case with defendants, but while that agreement also called for movement toward JCAH accreditation and Medicaid certification, it did not remove defendants' compliance with the court orders as a requirement to be met and had a number of other safeguards, including creation of a panel of outside experts, that served to make it a more meaningful document.[42]

Any doubt about how Assistant Attorney General Reynolds viewed the *Wyatt* orders was removed when he wrote the following in a 1987 article that appeared in The New York Times magazine:

> James Madison observed in The Federalist No. 51, "In framing a government to be administered by men over men, the great difficulty lies in this: you must first enable the Government to control the governed; and in the next place oblige it to control itself."
>
> As evidence of how difficult Madison's ideal is to achieve, consider what is now

> being perpetrated upon the American public. I refer to the contemporary notion that the rights of the people can be made secure, not by government as a whole, but only by a morally zealous and apparently constitutionally boundless federal judiciary that undertakes, almost at will, to create and enforce new rights out of whole cloth.
>
> Take, for example, *Wyatt v. Aderholt*, a 1974 Court of Appeals decision in Alabama. The United States District Court had ordered three state mental institutions to provide specified levels of psychiatric care and treatment to those committed to those facilities. It issued highly detailed orders regarding the care that patients were to receive and declared that these orders represented what it called "constitutional minimums." The hospitals themselves and the state authorities were bypassed and the courts simply read their notions of proper care into the Constitution.[43]

Unlike Mr. Reynolds, Judge Frank Johnson, not surprisingly, saw the role of the courts in cases such as *Wyatt* somewhat differently:

> The cornerstone of our American legal system rests on recognition of the Constitution as the supreme law of the land, and the paramount duty of the federal judiciary is to uphold that law. Thus, when a state fails to meet constitutionally mandated requirements, it is the solemn duty of the courts to assure compliance with the Constitution. One writer has termed the habit adopted by some states of neglecting their responsibilities until faced with a federal court order 'the Alabama Federal Intervention Syndrome,' characterizing it as the 'tendency of many state officials to punt their problems with constituencies to the federal courts. . . . This role requires the federal courts to serve as a buffer between the state officials and their constituencies, raising the familiar criticism that state officials rely upon the federal courts to impose needed reforms rather than accomplishing them themselves.' As long as those state officials entrusted with the responsibility for fair and equitable governance completely disregard that responsibility, the judiciary must and will stand ready to intervene on behalf of the deprived.[44]

The contrast between these two lengthy quotes and their differing recognitions of the realities that underlie institutional litigation could not be more stark. Mr. Reynolds' statement reflects quite clearly the degree to which his Civil Rights Division was so focused on its specific agenda to preserve states' rights that it was prepared to ignore the historical context in which cases like *Wyatt* arose. It also demonstrates a willingness to ignore the severe harm to which residents of Alabama's mental health and mental retardation institutions had been and were being subjected.[45]

If the Department's switch in position in *Wyatt* was a quintessential example at the trial court level, of a change in strategy designed to increase deference to state officials,[46] its brief in the last round of the lengthy *Pennhurst* litigation showed the extent to which it had abandoned previous positions at the appellate level. The procedural history of the *Pennhurst* case is complicated.[47] By the time of the second remand to the court of appeals, however, the issue in the case was whether the extensive relief ordered by the district court could be supported on federal constitutional or statutory grounds. Previously, the Department had argued in the affirmative, but in its brief before the Third Circuit it abandoned its consistent support for plaintiffs' position and urged reversal of the district court judgment.

The Department based its position not solely on a narrow reading of the majority opinion in *Youngberg*, a reading which, by 1984, was certainly no surprise, but on the concurrence written by Chief Justice Burger:

> Largely for the reasons articulated by Chief Justice Burger in his concurring opinion in *Romeo* (457 U.S. at 329-331), we believe that involuntarily committed mental health [*sic*] patients have no substantive constitutional right to habilitation beyond the limited right to training recognized in *Romeo*.[48]

Moreover, the Department's brief rejected recognition of any right to community-based care for institutionalized residents,[49] and went on to reject any theory supporting a right to habilitation other than one based on its narrow reading of *Youngberg*.[50]

As in *Wyatt*, where the plaintiffs' failure to go along with the Justice Department's proposed agreement limited somewhat the immediate harm caused by the Department's change in position, the settlement of the *Pennhurst* litigation[51] before the Third Circuit issued its decision controlled the damage caused by the Justice Department brief. But in another sense, the damage to the Department's reputation in the mental disability field was serious. Critics such as the mainstream President's Commission on Mental Retardation, a group that advises the president on issues concerning mental retardation, attacked the Department for the abandonment of its previous positions.[52] Historically, the Department's strength in institutional litigation had been the expertise and continuity it had brought to the area. Position changes undercut that continuity, and, to the extent that the new positions were poorly justified, undermined any perceptions of expertise. The position changes were all the more striking because they occurred in cases such as *Wyatt* and *Pennhurst* that held great symbolic significance for those in the mental disability field. Furthermore, these cases had been discussed favorably, and in depth, during the congressional hearings on the proposed statute that was eventually enacted as CRIPA.[53] The Justice Department seemed unconcerned with the effect that reversals in these cases would have on courts, legislators, parents and advocates, not to mention on disabled people themselves.

Insofar as the above changes in litigation position were necessitated by changes in the law applicable to mentally disabled persons there would, of course, have been much less to complain about. But while the Department made this very argument in support of its new positions,[54] such a reading of the *Youngberg* case is insupportable. For example, virtually every lower-court decision since *Youngberg* has adopted the argument in Justice Blackmun's concurrence in *Youngberg* that states have an obligation at least to preserve the self-care skills of institutional residents.[55] The Justice Department has never adopted the concurrence as a policy, and its reliance in *Pennhurst* on Chief Justice Burger's *Youngberg* concurrence demonstrates powerfully its antagonism to the Blackmun position. More fundamentally, Mr. Reynolds' persistent effort to interpret *Youngberg* as having *rejected* a broad right to rehabilitation rather than simply not having addressed it has resulted in numerous lost opportunities to preserve the basic rights of institutionalized persons. For as Justice Powell wrote for the Court in *Youngberg*:

> A court may properly start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy, in terms more familiar to courts, may be stated as that training which is reasonable in light of identifiable liberty interests and the circumstances of the case.[56]

It is, therefore, crucial to interpret *Youngberg* in light of the specific issues that Nicholas Romeo presented (he abjured any claim of a broad right to habilitation) and to be sensitive to the possibilities of more expansive relief sought by other institutional residents.

The Justice Department's position that *Youngberg* rejected the notion that institutional residents have the right to receive habilitation or treatment in the least restrictive setting, thereby precluding any constitutional requirement that such residents be placed in community settings, finds greater support in the post-*Youngberg* cases. But even in this area, the Department has failed to explore the nuances of the possible interpretations of *Youngberg*, and has implicitly rejected the reasoning of those courts of appeals that have continued to recognize the constitutional requirement of community placement in at least some circumstances.[57]

The Department of Justice also makes an important contribution to the development of the law through its filing of briefs in important Supreme Court cases. During the Reagan administration, the Justice Department has either chosen not to file briefs in important cases such as *Youngberg* and *Mills v. Rogers*[58] , or has filed briefs that have once again demonstrated its failure to come to grips with the problems faced by mentally disabled people. An example of the latter was the brief filed by the Department in *City of Cleburne, Tex. v. Cleburne Living Center*.[59] In *Cleburne*, the Court struck down as applied a zoning ordinance that purported to set up special procedures for placement in the community of a group home for mentally retarded people. In the process of rejecting the ordinance, the Court, in an opinion written by Justice White, vacated the judgment of the Court of Appeals for the Fifth Circuit insofar as the appellate court held that mentally retarded persons represented a quasi-suspect class entitled to heightened scrutiny under the Equal Protection Clause. A number of commentators have criticized the reasoning of the opinion, especially for its superficial treatment of the historic discrimination suffered by mentally disabled persons.[60]

The Court's discussion of heightened scrutiny tracks the Department of Justice's brief in *Cleburne*[61] almost word for word. The Department's brief trivialized the historical discrimination suffered by mentally retarded people, insofar as that history was referenced at all.[62] It uncritically accepted the supposed distinction between legislative classifications based on mental retardation and those based on race and gender; that is, because the condition of mental retardation is sometimes relevant to governmental classifications, such classifications are not invidious.[63] Yet the brief never examined whether that condition was relevant to the governmental action being considered in the *Cleburne* case itself, the placement of a group home in a community. In fact, the Department did not even go as far as the Court in the case, recommending that the Court remand the case to the court of appeals for an assessment of the rationality of the municipality's ordinance rather than decide the issue on its own.[64]

Now, of course, it may be argued that the Court's decision in *Cleburne*, in which it adopted the Department's position on the quasi-suspect class issue, shows that the Department's assessment of the state of the law is quite accurate. But that view fails to account for the degree to which the Department's own positions *influence* the way in which the Court considers the issues before it. Obviously, the Department's positions do not *determine* the Court's views, and the Court might have issued its decision on the same basis even if the Department had not made the arguments that it did in its brief. But one thing is clear: when it came to the Reagan Justice Department, disabled people did not have an advocate before the Supreme Court.

B. The Department of Justice in the Reagan Administration has Failed to Implement CRIPA Adequately

The most notable aspect of the Department of Justice's efforts to enforce CRIPA has been its adoption of an attitude of intense hostility to the use of litigation as a means of forcing needed institutional change. Its rejection of litigation in favor of conciliation was based on a strained reading of the legislative history of CRIPA. Its approach demonstrated a fundamental misunderstanding of the causes of institutional problems and the factors supporting or hindering institutional change. The Department was satisfied to conduct seemingly interminable investigations that at first rarely resulted in enforceable judgments against state officials. It refused to use its authority under CRIPA to intervene in existing litigation. In the few cases that it did bring, the Justice Department filed virtually identical consent decrees in which it pursued narrow remedies that failed to address some of the most serious problems extant within the institutions under suit. In the end, the ineluctable conclusion was that the Department's enforcement strategy was coherent only if one took the ideological position that preservation of states' rights was more vital than the protection of the constitutional rights of institutionalized citizens.

In the early stages of the Reagan administration, the Justice Department simply failed to enforce CRIPA through litigation. It was not until April 1984 that the Department filed its first case against a mental health institution.[65] The first mental retardation case was not filed until January 1985.[66] In this early period, Department enforcement of CRIPA was characterized by inaction and delay. For example, in the Rosewood Center case, the Department initiated its investigation on November 7, 1980; filed its 49-day notice letter February 19, 1982; negotiated with state officials for two years until it sent a follow-up letter of findings in August 1984; and finally filed its complaint and accompanying consent decree on January 17, 1985.[67] In all, it took four years and two months between the Justice Department's initiation of its investigation and the filing of its complaint. While the Rosewood investigation was the most egregious example of the excessive delay of the Department's investigations, it was hardly the only one.[68]

The delay in Justice Department investigations was not only inconvenient; it could result in the unacceptable persistence of unconstitutional conditions. An angry Senator Weicker, in hearings on CRIPA held in 1983, confronted Assistant Attorney General Reynolds on his division's inaction in the Rosewood investigation.[69] Some time later, members of the senator's staff investigated conditions at a number of mental disability facilities. Among other things, they uncovered examples of substandard conditions within facilities being investigated by the Justice Department.[70]

In another investigation, which concerned conditions at the South Carolina State Hospital, a Republican state senator from South Carolina wrote a letter, in March 1983, to the United States Attorney for the District of South Carolina advising him of physical abuse of residents and misuse of restraints within the facility.[71] The state senator noted, among other things, that "I am convinced that no action will be taken by any branch of our [state] government." Two weeks later, the United States Attorney wrote to the Deputy Chief of the Special Litigation Section requesting that the Justice Department commence an investigation under CRIPA immediately. The Justice Department, however, did not initiate its investigation until almost six months later.[72] Thereafter, in February 1984, the senator complained in a letter to Assistant Attorney General Reynolds that the investigation was not being pursued zealously and, incredibly, that no one had contacted him even though he possessed most of the information related to the complaints about the facility. He noted that "a recent management audit. . . has revealed and documented case after case of patient abuse, unexplained deaths, rapes of patients by staff and others, drug trafficing [*sic*], fiscal mismanagement, and more." He added that political considerations made it unlikely that the state would take action to correct these problems. The Justice Department did not issue its letter of findings until November 23, 1984. It eventually filed a complaint and simultaneous consent decree on June 24, 1986, two years and eight months after initiation of the investigation, and three years and two months after the United States Attorney contacted the Justice Department.[73]

Not only did the Justice Department delay investi-gations in a number of cases, but it terminated some active investigations under questionable circumstances. For example, in April 1982, the Department initiated investigations into conditions at two Oklahoma mental retardation institutions.[74] These facilities displayed a shocking lack of suitable training for their residents, a number of whom suffered suspicious deaths. Many of the residents, including young people who were of school-age, were extremely high-functioning individuals who seemed to benefit little from institutional care. Residents on one ward at one of the facilities were observed being bathed en masse by aides using a garden hose.[75]

After its analysis of these conditions, the Justice Department sent its notice of findings to state officials on May 23, 1983.[76] Subsequently, the Department put its investigation on hold to allow the state to correct these conditions voluntarily. It took more than a year and one-half for the state to satisfy Department officials that conditions at Enid State School were sufficiently improved to warrant closure of the investigation; the Pauls Valley investigation was not closed until almost three years after the initial notice letter.[77] In 1984, during this period of voluntary state correction, a team from the Health Care Financing Administration (hereinafter "HCFA") of the United States Department of Health and Human Services (hereinafter "DHHS") conducted a "look-behind" survey of Enid and Pauls Valley pursuant to Title XIX of the Social Security Act (the Medicaid program). DHHS investigators discovered extremely disturbing evidence of problems at the institutions. As then-Secretary of Health and Human Services Margaret Heckler told Senator Nickles of Oklahoma:

> I think the situation is appalling; I really do. . . . In one of these facilities [Enid], less than one-half of the clients were receiving active treatment. They were virtually in a custodial situation, which is not what we consider adequate care today. . . .We found that professional services for the clients were not provided. There was no physical or occupational therapy, no psychological services. The physical environment lacked privacy and general maintenance was substandard, as was sanitation; and there were food and nutrition deficiencies, including such things as improper storage and handling of food. The reviewing of modified diets for individual patients did not exist. These were

comments and findings that the team noted in both facilities.[78]

Despite such evidence, however, the Department closed its investigation without even obtaining a judicially-enforceable consent decree.[79]

In another mental retardation facility in Oklahoma, Hissom Memorial Center, Mr. Reynolds rejected the recommendation of attorneys in the Division's Special Litigation Section to initiate an investigation of the facility in late 1983. He concluded that the "proposal to investigate did not indicate egregious and flagrant conditions at facility, pattern or practice, or grievous harm to residents."[80] Yet in July 1987, residents of Hissom won a major victory when a district court found substantial evidence that residents of the facility experienced physical abuse, regression in skills, lack of needed therapies, lack of privacy, and other classic institutional harms, and concluded that, to remedy these ills, all four hundred institutional residents should be placed in appropriate community-based settings.[81]

Of course, it could be argued that the proposed investigation presented to Mr. Reynolds did not present enough information to allow him to conclude that such conditions existed at the time the Special Litigation Section recommended that the Department initiate an investigation of the facility. But in 1985 hearings before the Senate Judiciary Committee on the nomination of Assistant Attorney General Reynolds to be Associate Attorney General, Marianne Becker, the parent of two multiply-handicapped residents of the Hissom Memorial Center, testified that she had brought conditions at Hissom to the attention of the Justice Department. She discussed the case with the Special Litigation Section attorney handling it,

> who said that they could take some information from us, but it had to be extremely serious, and that they didn't have any idea whether they could help us or not, and in fact, you know, off the record said that they seriously doubted that they would be able to help us.[82]

Ultimately, whether the problem was an inadequate investigation or the Assistant Attorney General's insufficient sensitivity to the issues presented, the result was the same: the Justice Department failed to investigate conditions within a mental retardation facility later determined to contain numerous examples of unconstitutional and illegal conditions.

There could be a number of legitimate reasons why the Department would initiate an investigation and then either close it without further investigation or litigation, or allow some period to elapse before terminating it without further action. In some cases, the information initially received by the Department might have suggested more serious harms than were ultimately uncovered pursuant to a more thorough investigation. Alternatively, a facility might close or so change the nature of its operations that the original basis for the investigation was no longer applicable. Also, there might be some cases where the state or local facility makes changes voluntarily under circumstances where it is apparent that a return to the former unconstitutional conditions would be unlikely.[83] But there have been at least some Justice Department investigations under CRIPA in which the Department's tolerance for delay and inaction appears to have no justification.

For example, in addition to those facilities discussed above, consider the case of the Department's investigation of the Atascadero State Hospital, a mental hospital in California. The Justice Department notified the state of its intent to investigate conditions at the facility on July 1, 1982, citing concerns in, among other areas, inhumane psychological environment and misuse of seclusion and restraints.[84] The following year the Department reported to Congress that it had conducted expert tours, staff and patient interviews, and reviews of various institutional records, and stated that the investigation was continuing.[85] The next year, the Justice Department reported that it had notified state officials of the investigation's findings on May 1, 1984, and that "[w]e're meeting with state officials to determine the most appropriate means by which to resolve this investigation."[86] In its Fiscal Year 1985 Report, the Department stated that negotiations with state officials were "nearing a conclusion with respect to a proposed settlement agreement. . . ."[87] Those negotiations stalled, and in its next report the Department noted that a consultant psychiatrist retoured the facility and that constitutional problems remained.[88] Yet in its next and most recent report, the Department stated that negotiations continued and that:

> due to voluntary remedial steps undertaken by the State to bring conditions at these facilities[89] up to a constitutionally adequate level, we have allowed an additional short period of time for the State to implement the remainder of its corrective actions. We are monitoring the State's progress and will retour the facilities with our expert consultants to assess the scope and effectiveness of their remedial efforts. Once we complete our reevaluation, we will advise the State as to our findings.[90]

Thus, over *five years* after initiation of the Atascadero investigation, the Department is still investigating conditions and has not obtained any agreement to remedy the unconstitutional conditions let alone a judicially enforceable one.

The 49-day notice letters[91] themselves sometimes seem written by Justice Department officials in such a manner as to apologize for the need to report the existence of unconstitutional conditions to state officials. In its 49-day letter to state officials regarding Benton Services Center Nursing Home, Assistant Attorney General Reynolds felt compelled to observe no fewer than three times that certain possible relief was not consistent with the Department's interpretation of *Youngberg*.[92] Moreover, as Senator Weicker's staff observed in its comprehensive review of institutional conditions, a comparison of the "minimum measures" sections of two 49-day letters "reveals the general nature of the prescription 'to bring each of these conditions to the minimum level required by the Constitution of the United States.'"[93] The generality of such proposed relief would prefigure the generalized nature of the consent decrees sought by the Department in the few CRIPA cases it actually filed.

The Justice Department has also stopped intervening in ongoing litigation concerning mental health and mental retardation institutions. Early in the Reagan administration, staff attorneys in the Special Litigation Section presented Mr. Reynolds with recommendations to intervene in two mental disability cases. He rejected both recommendations. In one case, concerning the Grafton State School in North Dakota, he concluded that conditions were so egregious that Justice Department intervention was unnecessary.[94] In the other case, he rejected intervention in a case in which plaintiffs' attorneys argued that the state's plan for community placement of mentally retarded residents was not only not required but was unconstitutional because community settings were *inherently* unable to meet their habilitative needs.[95] Mr. Reynolds rejected intervention because he believed that plaintiffs' attorneys were doing an adequate job and because the Justice Department should not choose between competing forms of relief (institutional improvement versus community placement) for institutional harm.[96] But he appeared to have missed the point. For if, as he argued at great length elsewhere, the states ought to be able to choose between different methods of ameliorating unconstitutional institutional conditions, he should have intervened to prevent plaintiffs from removing community placement as a possible remedy. His failure to do so suggests the persistence of his true antipathy to community placement as an *available* remedy for institutional harm and lack of activity.[97] In any case, the message to his staff attorneys was apparently clear, because, with the exception of one relatively limited forensic mental health case in 1982,[98] the Department has not used its authority under CRIPA to intervene in mental disability litigation.

This failure to use its intervention authority under CRIPA was perhaps understandable at first, especially since the principal problem that the statute was enacted to address was the Department's lack of statutory authority to bring original suits. But Congress's inclusion of a statutory section on intervention within CRIPA certainly indicates that it contemplated some use of this authority. Moreover, intervention does present some advantages to the Department over original suits. With active plaintiffs' attorneys on or near the institutional site, it becomes easier for the Department to monitor conditions within the facility under investigation, whether it is pre-trial or post-trial (or post-consent decree). Otherwise, it is often difficult for a small number of attorneys in Washington, D.C. to keep abreast of institutional developments. Intervention also facilitates close working relationships between the Department and advocacy groups litigating mental disability cases around the country. Unfortunately, as will be discussed more fully below, the Department has avoided such relationships, and, at this point, there is some question whether plaintiffs' attorneys would seek Justice Department involvement in their cases.[99]

In the early years of the Reagan administration especially, the Justice Department justified its lack of litigative activity by rewriting CRIPA's legislative history to stand for the proposition that the statute was passed because of dissatisfaction with litigation.[100] Nothing could have been further from the truth. Congress clearly recognized that litigation was a necessary enforcement tool in the battle to assure vindication of the rights of institutionalized persons.[101] The only lawmakers who indicated a dissatisfaction with litigation were those who opposed the bill.[102] The frustration Congress expressed in considering CRIPA was not the slow pace of change that occurred in litigation, but the danger presented to the enforcement of the rights of institutionalized persons by the questions concerning the Department of Justice's litigation authority.[103]

To buttress his position that the Department's conciliatory approach could reap results that were superior to those that would follow after litigation, Assistant Attorney General Reynolds regularly cited the case of the closure of the Dixon Developmental Center, a mental retardation institution in Illinois, subsequent to the initiation of a CRIPA investigation.[104] But what a curious example of Departmental success this was! The closure of the Dixon Developmental Center was, in fact, a response to very different factors: bad publicity resulting from a local television expose and, most significantly, the governor's need for more prison beds, a need that could be met in part by making the center into a prison. The Department of Justice never asked the state to close the center, nor did the state ever indicate that its decision to close the facility was in response to Justice Department pressure. Given the Department's hostility to relief that it perceived to encroach on state prerogatives, it cannot seriously be maintained that the Justice Department would have urged the closing of the facility as a means of addressing the problems identified in its CRIPA investigation. Mr. Reynolds' argument to the contrary only shows the extent to which he was prepared to manipulate facts in an effort to demonstrate his division's enforcement zeal.

According to the latest available figures, the Justice Department has initiated ninety-two investigations of facilities under CRIPA, including prisons, jails, and juvenile facilities, as well as mental disability institutions.[105] Although precise figures are not available, it appears that forty-six of these investigations relate to mental health, mental retardation, or nursing home facilities.[106] Of these investigations, only twelve have led to the filing of a complaint in federal district court, and of these twelve only three cases have been actively litigated for any period of time.[107] Thus, in terms of sheer numbers, there has been very little mental disability litigation under CRIPA.

But numbers, of course, do not tell the entire story. Examination of the CRIPA cases actually filed reveals a number of disturbing patterns. The relief sought in these cases is extremely narrow, in keeping with the Justice Department's constricted reading of the *Youngberg* case and its effort to promote its vision of states' rights. Thus, the decrees are completely silent on any requirement for community placement of any institutional residents, though such placement may be undertaken by the state *at its option* as one means of satisfying the staff:resident ratios that are part of every Justice Department decree. The consent decrees follow a standard format with almost no variation from case to case. The decree sections that purport to contain statements of the underlying rights possessed by the institutional residents list few such rights; those rights listed are stated in the narrowest terms possible. Such statements of rights are not only crucial in their own right but, given language in the decrees, establish the limits of the court's enforcement power.

Mechanisms for enforcement of the provisions of the decrees are insufficiently detailed. Almost no decrees contain provisions for immediate, short-term relief, but rather rely on the state devising a series of plans to satisfy the vague terms of the decree. Yet the consent decrees are often imprecise about the criteria for evaluation of the adequacy of such plans. In some circumstances, the decrees place the burden on the *Justice Department* to demonstrate the plan's inadequacy rather than on the state which has admitted, at least implicitly, violating the constitutional rights of its institutionalized citizens. Statutory bases for relief, principally claims under Section 504 of the Rehabilitation Act,[108] and the Education for All Handicapped Children Act,[109] are pursued rarely.

In addition to these aspects of the decrees themselves, the Department's historic partnership with public interest and mental disability advocacy groups, has dissipated in CRIPA litigation. As will be recalled, these groups were among the most vocal supporters of CRIPA when it was enacted in 1980.[110] In the Reagan administration, these former allies now found themselves opposing the Department of Justice or supporting its only reluctantly. As a result of all of the above factors, discussed more fully below, the Justice Department's litigation is much less successful in addressing true institutional problems than it could or should be.

The narrowness of the relief sought by the Justice Department in CRIPA cases is demonstrated by the settlement agreement incorporated into the consent decree filed in *United States v. Indiana*,[111] which, as noted previously, was the first mental health case filed under CRIPA. In the section entitled "General Principles" the settlement agreement states that:

> All residents of the hospitals must be consistently afforded daily medical and custodial care sufficient to guarantee their constitutional rights to freedom from unreasonable risks and harm to their personal safety and from unreasonable bodily restraints.[112]

Such a statement does not even go as far as the Department's narrow reading of *Youngberg* in that it fails to provide for a right to training designed to achieve a right to safety and freedom from restraint.

Later CRIPA cases do make reference to the *Youngberg* rights, but again in the narrowest terms possible. Typical is the statement of a right to training contained in the consent decree negotiated and entered in *United States v. Colorado*:[113]

> The State of Colorado and the United States agree to the following general principles:
>
> 1. With respect to all residents, decisions regarding medical treatment, training, and basic self-care skills (e.g., feeding, toileting) shall be made and rendered consistent with the exercise of professional judgment by a qualified professional.
>
> 2. All residents must be afforded appropriate care and medical treatment.
>
> 3. All residents must be afforded such training as is reasonable to guarantee their constitutional rights to freedom from unreasonable risks of harm to their personal safety and freedom from unreasonable bodily restraints.[114]

Here, as in *United States v. Indiana* and virtually all of the Justice Department's consent decrees,[115] the phrase "professional judgment" is not defined. Because a "qualified professional" is defined only as a "person competent, whether by education, training, or experience, to make the particular decision at issue," [116] the risk is great that so long as *someone* makes the decision at issue, however inappropriate, an institutional resident has no right to complain. Even *Youngberg*'s limited formulation of an institutionalized person's right to training, are determined by qualified personnel, provides more specific protection for institutionalized residents. *Youngberg* requires an inquiry not only into who made the professional judgment at issue, but also whether the judgment is the type of judgment such professionals make. The quality of the professional judgment thus is inevitably implicated. The Justice Department approach to individuals' rights creates strong incentives for cynical, formalistic compliance by poorly trained institutional staff who might be heard to say to a resident, "You are getting adequate training because I say that you are."[117]

Deference to professional judgment is not necessarily a bad thing. But the professionalism of the judgments made by institutional personnel is, or ought to be, rendered suspect when those very same professionals or their superiors have allowed "egregious and flagrant conditions" to exist within the institution, often for a substantial period of time.[118] The Justice Department's unquestioning deference in such a context is unresponsive to the realities of institutional conditions within substandard state facilities.

Every Justice Department CRIPA consent decree follows essentially the same pattern: after several introductory paragraphs describing the background of the litigation there are sections on definitions; general principles; staffing, including staff:resident ratios; planning objectives; plans; and construction and implementation. The staff:resident ratios are virtually the only specific relief sought that is not solely in the nature of a plan to accomplish certain objectives. While resorting to plans in institutional disability litigation is not unusual, the absence of virtually any direct, immediate relief ensures that the process of remediation will be protracted, especially when the plans contemplate a lengthy period of implementation.[119]

Within the planning sections of the decrees, moreover, there are a number of provisions that reflect the ambivalence of the Department's enforcement efforts. After the state proposes a plan, pursuant to the consent decree, the Department has sixty days to object to the plan. If the parties cannot resolve their differences, the "adequacy of the contested plan shall be determined by the Court in light of the United States' objections, using the standards set forth herein."[120] The language "standards set forth herein" appears to refer to the general principles discussed above. Thus, to the extent that those principles are narrowly stated, the efficacy of the state's plans is necessarily limited. The consent decrees do not specify on whom the burden of persuasion rests to demonstrate that the plans meet the requisite standards. The decrees also provide that if the state proposes to modify a plan once adopted, the court should apply the same standard in assessing the modification as it does in approving the original plan. Again, significantly, the decrees do not place the burden of persuasion on the state as the party seeking modification of the plan, but rather typically are silent on the matter.[121]

The consent decrees also contain several curious provisions that render problematic enforcement of the plans themselves. In some instances, the decrees contemplate, and state specifically, that defendants will achieve full compliance at some unspecified time in the future. The decrees are silent on how, when, and by whom, such determination of compliance will be made. Once compliance is deemed to have been achieved, the defendants may move for dismissal of the case. The burden of persuasion is on the *United States*:

> to demonstrate that the defendants have not fully and faithfully implemented all provisions of this Consent Decree or any approved plan(s) or any part thereof and, if objection is based upon failure to implement such plans or part thereof, that such plan or part thereof *is essential to the achievement of one or more of the General Principles set forth in Section II of this Consent Decree.*[122]

Thus, in addition to finessing the determination of compliance, the consent decrees not only place the burden of persuasion on the United States but contain a major loophole for a defendant who can demonstrate (or, at the very least, assert) that although a plan has not been complied with, it is not an essential attribute of the residents' constitutional rights. Once again, the limited nature of the general principles contains the seeds for substantial limitation upon enforcement of a crucial portion of the relief ostensibly sought by the Justice Department.

The ambiguous status of the implementation plans is further emphasized by the absence of language in some consent decrees clarifying that the plans will be adopted by the court and have the status of court orders. Such incorporation language does appear in some consent decrees;[123] its absence in others suggests either sloppy drafting or else a substantial problem concerning enforcement of the plans' provisions.[124]

Substantively, the "planning objectives" and "plans" sections of the various consent decrees are virtually identical. Almost every consent decree, for example, has a paragraph requiring the state's plan to provide:

> A description of recordkeeping systems and procedures, including methods of implementation, designed to ensure that necessary information relating to each resident is maintained and will be available in making and evaluating decisions with respect to care, medical treatment and training.[125]

Such a provision is not inappropriate, but its presence in almost every consent decree suggests that the Justice Department goes into its negotiations with state officials with a preconceived idea about what relief is appropriate.

The adequacy of the enforcement of CRIPA consent decrees, and the plans submitted in furtherance of them, is a critical issue in assessing the success of the Justice Department's CRIPA program. As noted previously, Mr. Reynolds' principal response to his critics' complaints that the Department has not brought enough litigation under CRIPA has been to argue that the Department's posture of seeking nonadversarial solutions will result in more effective and expeditious correction of harmful institutional conditions.[126] This claim has already been examined in those matters that have not resulted in litigation. What is its force in the cases settled by consent decree? Assessing the effectiveness of consent decrees, in the absence of evidence of compliance appearing in the public record, is difficult at best. But the Department's own annual reports on CRIPA reveal some interesting facts.

First, although the Department's first mental disability consent decree under CRIPA, in *United States v. Indiana*, was entered on April 6, 1984, final compliance still has not been achieved more than four and one-half years later. Annual reports subsequent to the entry of the consent decree report that the Department has conducted monitoring and compliance tours since 1984.[127] In the annual report for fiscal year 1987, the most recent one available, the Department reported that the staffing at the Indiana facilities continues to raise constitutional problems.[128] In *United States v. Maryland*, the Department reported in its 1986 annual report that expert tours of Rosewood showed there to be continuing noncompliance with the 1985 consent decree, and indicated that it was considering its enforcement options, "including the initiation of contempt proceedings against the State."[129] In the following year's report, however, the Department backed down from its aggressive stance; while noting continued deficiencies in the institution, it said only that it was considering what enforcement actions to take.[130]

The plain fact is that the Department has not dismissed any of its mental disability consent decree cases on the basis that defendants have achieved compliance with the decrees or plans. When the often substantial time period from initiation of the investigation to the filing of the complaint and consent decree is factored into the equation, it is impossible to maintain credibly that the Justice Department's approach of conciliation provides quicker and more effective relief to the victims of institutional harm than do litigation approaches.

Because students of the field of mental disability litigation long ago learned the lesson that "the hard part"[131] of effecting institutional change *begins* with the entry of the decree, whether after a trial or based on an agreement between the parties, the willingness of plaintiffs to avail themselves of creative enforcement mechanisms is critical to the success of the underlying enterprise. As manifold cases in the field demonstrate, entities such as review panels, special masters, and court-appointed monitors play a crucial role in providing compliance information and a mechanism for translating that information into specific items of relief. While special masters and their cognates are normally considered "extra-ordinary" means of enforcement for a federal judge to utilize, the complexity of mental disability cases makes them virtually the norm in this area of litigation.[132] Yet the Justice Department has refused to resort to such mechanisms in its CRIPA cases.[133] Thus, it has voluntarily weakened its ability to ensure that the orders it supposedly has worked so hard to obtain will be enforced adequately.

One consequence of failing to seek appointment of special masters in CRIPA cases is that all enforcement responsibilities devolve upon Justice Department personnel. The frequency of monitoring in CRIPA cases, however, does not create confidence in the Department's ability to perform this function with sufficient intensity and rigor.[134]

To return to the substantive content of the consent decrees themselves, there are other examples of identical decree provisions that are problematic. For example, almost every consent decree requires the state's plan to address the appropriate administration of such "treatment modalities" as physical restraints, seclusion (placement of residents alone in a locked room), and psychotropic medication. The consent decrees provide that such intervention techniques will only be utilized as part of a training program and not for the convenience of staff. These limitations are consistent with the state of the law and accepted professional judgment concerning the use of these techniques. But recent Justice Department consent decrees contain an exception to such limitations "when appropriate, to control residents when they engage in isolated incidents of violence and/or dangerous behavior."[135] This exception has the potential to swallow the limitations, for it is precisely when poorly trained staff believe that the resident is uncontrollable that they are most likely to misuse restraints, seclusion, and psychotropic medications.[136] Such a provision would be bad enough if states insisted on it. Remarkably, though, it is the Justice Department that has proposed inclusion of such language in its consent decrees.[137]

In mental disability litigation under CRIPA, though not in prison litigation under the statute, the Department of Justice is authorized to seek remediation of institutional violations of federal statutory law as well as constitutional violations. The Department has made almost no use of this authority in its consent decrees, although statutes such as Section 504 of the Rehabilitation Act,[138] the Education for All Handicapped Children Act,[139] and the Developmentally Disabled Assistance and Bill of Rights Act,[140] provide rich opportunities for protection of the rights of institutionalized disabled persons. In the few cases where statutes are mentioned in the consent decrees, the decrees provide virtually no relief that relates to them.[141]

Perhaps the most significant development in the field of mental disability in the last ten years has been the increasing use of community-based programs in lieu of institutions for the treatment and habilitation of mentally disabled persons. As noted previously, federal law in this area has developed haphazardly, yet there is clear support at the district and court of appeals levels for resort to community placement when professional judgment deems it to be appropriate.[142] Moreover, numerous states have adopted community-based treatment as the treatment of choice for large numbers of their institutionalized residents. CRIPA consent decrees could have served as a useful adjunct to this trend toward appropriate community-based treatment. But one can search far and wide for any evidence that the Justice Department considers community placement to be a permissible remedy for egregious and flagrant institutional conditions. CRIPA consent decrees are silent on the need even to assess the desirability of community-based care for institutional residents, except that the Justice Department does permit state officials, *at their option*, to meet staff:resident ratios either by increasing staff or by discharging residents.[143]

Once again, the Justice Department's ambivalence about its role in CRIPA litigation is painfully evident. As one recent legal commentator has observed, even if the Department were on solid ground in its refusal to seek community placement relief, its resistance to community placement extends even further to its failure to monitor the kinds of programs in which institutional residents are placed.[144] But if the Justice Department is reluctant to pursue community placement relief, it has been less shy about taking credit for it. In its report entitled *Civil Rights Division: Enforcing the Law, January 20, 1981--January 31, 1987*, the Justice Department observed:

> Over 1,900 residents of eight mental health and mental retardation institutions have been placed in alternative programs and facilities *as a result of state efforts* to reduce the institutional census and to place residents in more appropriate community settings.[145]

Only the most acute observer would glean from this artful language that such efforts at community placement have occurred with absolutely no support from the Department. Moreover, the language emphasized again the Department's penchant for taking credit for almost any positive development in a state institution being investigated under CRIPA, whatever the true cause of that development.

It is the issue of community placement that has served to divide former allies such as the Mental Health Law Project and the Justice Department. In *United States v. Massachusetts*,[146] residents represented by the Mental Health Law Project and others sought to intervene in the Justice Department's CRIPA case against state officials responsible for operating the Worcester State Hospital. The prospective intervenors sought intervention because of their concern that the Justice Department would not adequately represent residents' interests. In addition to questioning the Department's aggressiveness in seeking vindication of the resident rights it sought to pursue, the residents noted that the Department was not seeking to enforce the former's rights to avoid unnecessary institutionalization and to receive minimally adequate treatment and training in an appropriate setting.[147] The Justice Department conceded that it did not seek to enforce such rights, even arguing that "to the extent that [such issues] may deal with pre- and post-confinement issues unrelated to conditions at Worcester State Hospital, they are outside the scope of this--or any--CRIPA suit."[148] Arguing that intervention would expand the scope of the lawsuit and delay its resolution, the Justice Department opposed both permissive intervention and intervention as of right.

The district court agreed with the Department's position and denied intervention[149] although it agreed to allow the disappointed intervenors to participate in the case as *amici curiae*.[150] The court reasoned that intervention was not timely and that the Department of Justice would adequately litigate the claims that it was pursuing. The proposed plaintiff-intervenors were free to bring their own lawsuit to seek the relief that the Justice Department eschewed. The court concluded that whatever lack of aggressiveness characterized the Department's CRIPA enforcement efforts nationally, it was undeniable that it *had* sued the State of Massachusetts and was seeking to ameliorate the egregious and flagrant conditions that it alleged existed within the Worcester facility. The court indicated that the proposed intervenors could "pursue political avenues to persuade the Justice Department to change its role."[151]

For present purposes, the district court's legal analysis is less significant than the case's demonstration of the divergence between the Justice Department and advocacy groups in their visions of CRIPA and their interpretations of the statute.[152] Proposed intervenors argued that "the nature and purposes" of CRIPA supported their intervention, even if the statute did not explicitly authorize it.[153] They thus conceived of CRIPA as a joint venture between the government and institutional residents acting through their advocates. The Justice Department, on the other hand, conceptualized CRIPA as a kind of private statute that authorized its own activities but said nothing about the role of private parties, except that CRIPA could not preclude the prosecution of private suits.[154] A Justice Department more committed to enforcement of the rights of institutionalized persons would have welcomed the participation of resident representatives in the case. Indeed, given the Department's focus on institutional conditions and the proposed intervenors' emphasis on community placement, the parties might well have devised a sensible division of responsibility in the case that would have maximized the opportunities for meaningful relief.

Interestingly, *United States v. Massachusetts* may have presaged a new trend in CRIPA litigation of private piggybacking on the Justice Department. In *United States v. Oregon*,[155] the Court of Appeals for the Ninth Circuit reversed the district court's denial of intervention sought by residents of the Fairview Training Center and granted intervention as of right. Once again, proposed intervenors were represented in part by lawyers from the Mental Health Law Project. Unlike the *Massachusetts* case, the intervention was sought early in the case before substantial discovery had taken place. The Justice Department opposed intervention as of right by the residents, although, to its credit, it did not oppose permissive intervention. The Department took this position because it did not want to concede that it did not adequately represent the interests of the residents that the proposed intervenors sought to protect.[156] Such a concession would have been necessary to justify intervention as of right.

As in *United States v. Massachusetts*, the Department asserted again that insofar as it did not seek relief in the area of community placement, proposed intervenors who sought such relief were not precluded from bringing their own lawsuit. But the Court of Appeals took a more inclusive view of intervention than did the district court in *Massachusetts*. It concluded first that the United States did *not* adequately represent proposed intervenors' interests precisely because it refused to raise the community placement issues that the intervenors sought to air. Second, it noted that if the Department were to prevail in its CRIPA case, the state would undoubtedly have to devote substantial resources to the Fairview institution to improve conditions there. Such a commitment of resources might well preclude the expenditure of funds necessary to establish community placements. The brief court of appeals opinion thus reflects a more nuanced approach to the practical effect that CRIPA cases might have on private litigation. Its resolution is more in keeping with the historical nature of institutional litigation than is the court's decision in *United States v. Massachusetts*. Nevertheless, the Department of Justice's equivocal position on intervention demonstrates its continued ambivalence about its relationship with advocacy groups with which it formerly worked hand in hand.

The final case reflecting the newly contentious relationship between the Justice Department and advocacy groups was *United States v. Connecticut*,[157] the Justice Department's CRIPA case concerning conditions at the Southbury Training School. In that case, the executive director of Connecticut's Office of Protection and Advocacy for Handicapped and Developmentally Disabled Persons (hereinafter "P & A agency")--the agency established under the Developmentally Disabled Assistance and Bill of Rights Act[158] to advocate on behalf of developmentally disabled persons--sought to participate in the negotiations between the Justice Department and state officials respecting the measures needed to rectify unconstitutional conditions at Southbury. As is normally the case in CRIPA actions, the Justice Department entered into negotiations with representatives from the state attorney-general's office subsequent to sending the state its "49-day letter." The executive director of the P & A agency became aware of the negotiations and asked to be included in them. Although the state officials did not object to his participation, the Department of Justice did.[159] Ultimately, the negotiations proceeded without the executive director and led to a negotiated agreement between the Department and state officials that was submitted to the district court for its approval. The executive director of the P & A agency brought a mandamus action designed to force the parties to reopen the negotiations and include him in them.[160]

The court held that CRIPA did not require the Justice Department to include the director of the P & A agency in its negotiations. The court determined that neither the language nor the legislative history of CRIPA supported the executive director's position that he was the kind of state official that should be included in CRIPA negotiations. It also observed that the presence of the P & A director in the negotiations might preclude, or at least delay, their successful conclusion. But assuming *arguendo* that the court was correct in its concern that multiparty negotiations could become unwieldy, the significance of the case is not the ruling itself but rather the Justice Department's antipathy to the participation of an advocacy group--in this case, a group established by the state itself pursuant to federal statutory authority--in negotiations *even where the state itself did not object*. From the Justice Department's perspective, an opportunity was missed to broaden the coverage of the CRIPA case and include all relevant viewpoints in the settlement discussions. From the standpoint of the P & A agency, and the residents it purported to represent, the Justice Department's private negotiations with state officials ran the risk of jeopardizing the interests of those most affected. And once an agreement is reached and proposed to a court for its adoption, because courts are not required under CRIPA to hold a hearing on the fairness of the proposed settlement,[161] institutional residents do not have a meaningful voice in resolution of a case that could affect their lives in substantial ways.[162]

The strained relationship between the Justice Department and public interest advocacy groups in the disability area is reflective of a broader problem affecting the Department's work in this area: the loss of continuity and diminution of institutional memory. Shortly after Mr. Reynolds' appointment as assistant attorney general, and certainly by the time of the previously discussed *Youngberg* memorandum in June 1982, it became apparent to staff attorneys in the Civil Rights Division's Special Litigation Section that the Justice Department would no longer be an aggressive advocate for the rights of institutionalized persons as those rights had come to be commonly understood. As a result, turnover of personnel in the section reached new highs, nearing 100 percent in 1983-84.[163] As testimony revealed at Mr. Reynolds' hearings on his 1985 nomination to be associate attorney general, a substantial number of those attorneys who left the Department did so over differences with Mr. Reynolds concerning enforcement of the rights of institutionalized persons.[164] The departure over such a concentrated period of so many of the line attorneys who had litigated institutional cases and conducted CRIPA investigations left a major gap in the section's institutional knowledge and memory. That knowledge gap was exacerbated by the strain in relations between the Department and advocacy groups, as an important source of education of new attorneys was lost. Indeed, anecdotal evidence suggests that even some experts who formerly had assisted the Department in its litigation and investigations shied away from continued involvement out of concern that they would be unduly limited in their assessment of institutional conditions to the narrow issues the Department chose to investigate.

In addition to experienced personnel leaving the Special Litigation Section, the section has had serious shortages in the number of line attorneys for substantial periods of time in recent years. Until several attorneys were hired in the Fall of 1988, for example, the section had been reduced from a staff of approximately eighteen attorneys, including three supervisors, to thirteen, again with three supervisors. This reduction reflected a decrease in the number of authorized positions as well as the existence of unfilled slots for a lengthy period. It is difficult to imagine how ten line attorneys can realistically be expected to enforce the rights not only of institutionalized disabled persons but of prisoners, jail inmates, and residents of juvenile institutions as well. The danger is very real that the few remaining experienced attorneys will be spread so thin that they will burn out quickly and exacerbate the problem of discontinuity and inexperience in the section. The reduction of attorney person-power is especially troublesome for CRIPA enforcement because of the Department's previously described refusal to avail itself of enforcement mechanisms, such as special masters and expert panels, that can assist in reducing the enforcement burden placed on Special Litigation Section staff.

The end result of such shifts in willingness to enforce the law, policy, personnel, and perceived effectiveness is that the Department of Justice now labors virtually alone in a narrow segment of the institutional litigation field. That posture is an unfortunate one for those who continue to work there. It is even more unfortunate, though, for the residents of inadequate institutions that depend on vigorous, coordinated enforcement of CRIPA and other laws for their very survival. Rather than reflect a response to new legal developments, the Justice Department's retreat from the mental disability field has demonstrated the degree to which a Civil Rights Division committed to an extreme vision of states' rights can lose sight of its basic reason for being: the protection of the civil rights of the country's most vulnerable citizens.

IV. Emerging Issues and Challenges in Institutional Mental Disability Litigation

There is, inevitably, a somewhat schizophrenic quality to any assessment of the future direction for recognition and enforcement of the rights of institutionalized disabled persons. On the one hand, the Department of Justice has so isolated itself from current developments in the field that any assessment of its future activities must begin with a process of reorientation to the inclusive, aggressive perspective on the rights of institutionalized persons that prevailed in the years before 1980. Only after such a reorientation can the Department begin to reestablish itself as a significant force in the protection of institutionalized persons' rights. Yet, no field in the area of civil rights law stands still, especially one so new and developing as mental disability litigation. Thus is a danger that the Justice Department will find itself in a hopeless game of catch-up while developments in the field pass it by.

Nevertheless, it is possible to suggest a number of broad themes that seem likely to characterize the field of institutional mental disability litigation in the years to come. Further, it ought to be possible to describe some specific steps that would improve the functioning of the CRIPA statute under circumstances where the Justice Department was serious about its enforcement responsibilities.

An undeniable fact within the area of institutional litigation is that institutions housing disabled people are getting smaller. The large, congregate, isolated institution of the past is likely to become an anachronism within the relatively near future. Where institutions containing 1200 residents were commonplace as recently as ten years ago, they are fast becoming the exception rather than the rule. Relatedly, the last several years have seen the closure of some of the most notorious mental disability institutions in the country, such as the Willowbrook and Pennhurst facilities. While building renovation programs at existing facilities continue (often as a result of real or perceived pressures from federal medicaid officials or the

Justice Department pursuing its CRIPA investigations), it seems unlikely that construction on a grand scale of large, new facilities is likely to occur at any time soon.

The reasons for these developments are complex. They relate to a confluence of a number of factors, including: an increasing awareness of the inhumane conditions within large institutions, and a developing consensus that improvement in institutional conditions is an inadequate response to them; effective, impassioned advocacy by and for institutionalized disabled people that has placed before the general public their concerns about the quality of their lives and their (and society's) need for integration into the community; the recognized effectiveness, increasingly supported by data,[165] of community residential and training programs for individuals appropriately placed in them; and the geometrically rising cost of truly adequate institutional care, and the concomitant cost-effectiveness of community-based care.

The challenges that this decreasing dependency on institutional care presents are many. At a minimum, it means that advocates need to be concerned about the nature of the community placements in which former or potential institutional residents may be placed. Abuse and neglect of mentally disabled persons is not restricted to the institutional locale, as the many stories of child and spouse abuse in the community attest. Recent data suggest that refractory institutional problems, such as staff turnover, are not unknown in community-based programs. Clearly, mechanisms to monitor conditions within community facilities must be developed, and litigation in this area will undoubtedly focus on the establishment of such mechanisms. Given the inherently dispersed nature of community placements, this monitoring is likely to be even more difficult to maintain than in the institutional environment.

At the same time, we must be careful not to assume that the reduction in the size and number of institutional settings represents an irreversible, inevitable trend. The serious problem of homelessness, and the widely held perception that mentally ill individuals comprise a large majority of the homeless population, has already created substantial pressure for relaxation of state civil commitment laws to make it easier to commit individuals thought to be in need of care. Some observers have concluded that the large number of homeless mentally ill individuals demonstrates the failure of deinstitutionalization policies over the last thirty years. Such an interpretation is both simplistic and fraught with assumptions that upon examination cannot hold water. But it does reflect, in a very powerful way, the view of many that there is a large population that has been abandoned by society and denied access to necessary aid because of a misplaced emphasis on individual liberty and civil rights. Anyone familiar with the historical development of mental institutions, in the nineteenth and early twentieth centuries, is aware that institutions were originally conceived of as reformist responses to the lack of humane treatment for mentally infirm individuals.[166] It would be presumptuous to assume that the current predilection for community-based care might not also contain various problems that will have to be addressed in the coming years.

If there will be greater reliance on community-based programs in the future, it does not follow that issues concerning the quality of institutional treatment will disappear. For one thing, too many institutions have discharged those residents who are relatively easier to place, leaving in the institution a disproportionate number of multi-handicapped, profoundly involved residents. In the past, resources were limited enough so that these residents' needs were barely identified within the institution. As other residents leave the institution, more staff resources will need to be devoted to the remaining group. Staff will need to be especially sophisticated and well-trained to address the problems of these residents. To the extent that community programs eventually replace institutions as the primary locus of care, it may be difficult to attract highly qualified staff to institutional settings. As long as large institutions remain in place, moreover, issues such as resident abuse, lack of privacy and individuality, and misuse of psychotropic medications, physical restraints and seclusion will continue to exist and will need to be monitored by various outside and inside advocacy groups.

One outgrowth of the *Youngberg* case--the effect of which will linger--is the explicit deference to professional judgment that the case countenances. It will be important for advocates in the mental disability field to continue to keep abreast of developing professional judgments and, in particular, to examine carefully the notion that anything a professional says is, by definition, an acceptable judgment. As yet, there are still plenty of cases where institutions fail to implement programs although they have been recommended by unanimous professional opinion. As institutions decrease in size, and professionals become more able (because of increased time) and sophisticated in their ability to protect themselves, one would expect there to be an increase in the number of cases where the professional can articulate some basis for a course of treatment that nevertheless falls short of adequately protecting the rights of the institutionalized person.

At a broader level, one should expect advocates in the mental disability area to pursue strategies designed to expand the rights recognized in the institutional context. Specifically, in the federal courts, there is a need to push the limits of the *Youngberg* decision and take advantage of the opportunities for an ongoing dialogue on residents' liberty interests that the decision presents. At a minimum, it will be incumbent on mental disability advocates to articulate the need for training, not only in self-care skills (as suggested by Justice Blackmun in his concurrence in *Youngberg*), but also for training designed to vindicate the resident's freedom from unnecessary confinement by facilitating placement in appropriate noninstitutional settings. The latter issue, not addressed in *Youngberg*, is likely to be the critical one in the years ahead as advocates argue against the pernicious notion that all those remaining in institutions somehow deserve to be there.

Between *Youngberg* and *Pennhurst State School and Hospital v. Halderman (Pennhurst II)*,[167] however, mental disability advocates may find that resort to state courts interpreting state constitutions and statutes is a more effective forum than federal courts for addressing the rights of institutionalized persons.[168] Such a position seems to fly in the face of conventional wisdom in the civil rights field, but has the advantage of allowing litigants to avail themselves of the ever-increasing number of expansive state statutes. The disadvantage of such an approach, of course, is that it provides fewer opportunities for the kind of resource reallocation that has so often been necessary in institutional litigation and that federal courts are peculiarly able to order, when necessary, to effectuate relief. State court litigation presents a special problem for the Justice Department, which has historically resisted appearing in state court civil rights cases because of its view that the sovereign should not submit itself to state jurisdiction. Nevertheless, it seems likely that there will be increasing use of state courts, at least as an adjunct to continuing federal litigation.

As the post-Reagan administration Justice Department surveys these possible trends, it must decide whether it wishes to reenter the dialogue concerning the development of the rights of institutionalized persons. If it does, there are a number of changes in CRIPA that could facilitate its efforts. First, the Justice Department's authority to investigate institutional conditions prior to filing suit, through attorney and expert tours of institutions, for example, must be clarified. In at least one case,[169] the Department had to go to court to get meaningful access to institutional facilities, access which is obviously necessary in order for it to conduct its investigation. In other investigations, there have been significant delays in the Department's ability to gain access to institutions. While Congress assumed that the Justice Department's right to sue implied a right to investigate, explicit recognition of the latter right would serve to streamline the Department's enforcement efforts.

Second, the statute's provision for notice of at least fifty-six days prior to filing suit (seven-day notice of investigation followed by a minimum of forty-nine days' notice before filing suit), should be amended to allow more expeditious investigation and possible suit in emergency situations. As it now stands, CRIPA is an unwieldy vehicle for addressing serious institutional problems of an emergency nature. A bill to amend CRIPA, introduced by Senator Lowell Weicker in the last Congress,[170] would have required the Attorney General to initiate an investigation of immediate life-threatening institutional conditions brought to his attention by the relevant protection and advocacy system.[171] The Weicker proposal would go some way toward remedying the problem of delayed investigations (although it might be too restrictive to limit the circumstances of the Justice Department's immediate intervention to matters raised by the P & A system), but it does not address the time lapse between the initiation of the investigation and the filing of a suit. If the conditions are especially egregious, and could cause immediate harm to residents, the state's interests in having an opportunity to address the problems in a manner that does not involve litigation would seem to pale against the need to protect vulnerable residents. At the very least, the Department should be authorized to seek relief in the nature of a temporary restraining order or preliminary injunction in those cases that justify immediate intervention.

The Weicker bill also contains several provisions designed to require the Justice Department to inform the appropriate state P & A system of its negotiations with state officials, give it notice of any consent decree it intends to propose to a court, and allow it to intervene as of right in any court action.[172] Such provisions would address situations, such as the one that existed in *United States v. Connecticut*, where the Department would not allow the state P & A agency to participate in its settlement negotiations with state officials. Requiring the participation of P & A agencies could complicate sensitive negotiations and decrease opportunities for consensual resolution of CRIPA investigations. Furthermore, fuller participation by representatives of institutional residents might actually impede institutional change if, for example, the Department were to return to a more supportive stance toward community placement and those representatives sought to oppose any relief designed to reduce institutional size.[173] But at a minimum, the Weicker proposal does strike a chord concerning the need for greater involvement in the CRIPA process of those most affected by the Justice Department's negotiations and activities.[174]

Another issue that should be addressed within the context of CRIPA litigation is the relationship between the Justice Department's CRIPA activities and activities of other federal agencies that provide financial assistance to state institutions. CRIPA already provides that the Department of Justice must advise other federal agencies of its investigations and consult with them prior to deciding to proceed with the CRIPA action.[175] But there are still difficulties in coordinating the Justice Department's investigations and the findings derived from them with the funding policies of the Department of Health and Human Services.[176] In some instances, substantial federal assistance has continued to flow to institutions even as the Justice Department has uncovered evidence of seriously deficient institutional conditions. In other cases, as discussed previously,[177] DHHS has produced information as a result of its surveys that has not been translated into effective enforcement action by the Justice Department.

The coordination problem is illustrated by the case of *United States v. Oregon*.[178] In that case, the State of Oregon obtained a preliminary injunction to prevent the Justice Department from directing the HCFA (the agency within the DHHS that provides federal funding to state mental retardation institutions under the Medicaid program), not to reinstate federal assistance to the Fairview Training Center unless the state agreed to enter into a consent decree in the Justice Department's CRIPA case. Part of the problem in the case may have been the Department's heavy-handedness in its approach to HCFA. However, an additional problem was that there was nothing in the Medicaid statute that required or even allowed HCFA to consider the state's compliance with constitutional standards of care as identified in the CRIPA investigation. At the very least, the Medicaid statute should be amended to allow HCFA to consider, and act on, information obtained by the Justice Department. Otherwise, HCFA could be in the awkward position of providing substantial financial assistance to an institution deemed by the Justice Department to be subjecting its residents to unconstitutional conditions.

Ultimately, however, these changes in CRIPA, or related statutes, will be of no moment unless the Justice Department rededicates itself to enforcement of the rights of institutionalized persons. Such a rededication will require leadership of the kind that has been lacking during the Reagan administration.

V. Recommendations

1. The Attorney General must name an assistant attorney general for civil rights who is committed to vigorous enforcement of the rights of mentally disabled institutionalized persons.

2. The new assistant attorney general for civil rights must commit him or herself to full and effective enforcement of CRIPA and to a generous interpretation of the constitutional and statutory rights of institutionalized persons.

3. The new assistant attorney general for civil rights must commit him or herself to the use of litigation under CRIPA where necessary to vindicate the rights of institutionalized persons.

4. CRIPA should be amended in various respects to make it easier for the Justice Department to investigate and, if necessary, sue immediately to enjoin institutional conditions that are imminently life-threatening. The statute should also be amended to clarify that other federal agencies that provide funding to institutions should take into account the findings generated by the Justice Department's CRIPA investigations. Finally, the new administration should consider ways, including amendments to CRIPA, that would enhance the involvement of mentally disabled persons, and their advocates, in the CRIPA negotiation and implementation processes.

5. The Justice Department should rediscover its links with public interest groups and other advocates for mentally disabled persons. To facilitate its own enforcement activities, the Justice Department should consider intervention in appropriate private civil rights actions seeking to remedy unconstitutional institutional conditions. Further, the Department should reconsider its opposition to intervention efforts into CRIPA litigation by private groups.

6. Finally, the Department of Justice must reenter the dialogue with courts, advocates, and others over the nature and extent of the rights of institutionalized persons. The Department should be involved in appellate litigation that seeks to expand these rights, rather than seeking to contract them, as it so often did in the Reagan administration. In particular, the Department must reconsider its policy of eschewing community placement as a possible remedy for unconstitutional conditions.

CHAPTER XXIII

CIVIL RIGHTS ENFORCEMENT POLICIES WITH RESPECT TO PRISONERS' RIGHTS

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I. Introduction

Despite efforts of prisoner rights advocates and civil liberties groups, prison problems persist in America. After touring several prison systems in the United States, one expert has observed, "Indeed, I found conditions in a prison in Michigan and a jail in Georgia which were worse than anything I have observed anywhere in this world including the jails of Mexico and Spain."[1]

To be certain, however, litigation has served in certain respects as an effective tool in eliminating and remedying past abuses of prisoner's rights. Examples of deplorable conditions and treatment which have been cured through litigation include excessive sentences such as "fifteen years in shackles at hard labor,"[2] involuntarily performed psychosurgery[3] and eradication of the infamous Alabama "doghouses," special unventilated and unlighted facilities in which eight men were packed into one cell.[4] In one successful landmark case, *Battle v. Anderson,* 564 F.2d 388 (10th Cir. 1977) disciplinary measures involving strapping inmates into unnatural and painful positions; subjecting inmates to water torture and forcing an inmate to stand in a three foot diameter circle for undetermined lengths of time, threatened with being shot if he placed one foot outside the circle were eliminated from the Oklahoma prison system.[5] This landmark litigation also served to put an end to the practice of throwing prisoners into "the hole" naked for months at a time without light or ventilation, nutrition or exercise while sadistic guards routinely gassed prisoners.[6] More recently, with the signing of a 1984 consent decree, abusive policies and mistreatment characterized by beatings, sexual misconduct and hog-tying (a practice of tying feet and hands behind the back and joining them with a chain) were eliminated and the Oklahoma juvenile system was brought in line with nationally recognized standards of treatment.[7] These cases present but a few examples of the instances in which litigation has successfully changed the American penal system.

Despite a small measure of success through litigation, unconstitutional conditions continue to thrive in the correctional institutions throughout the nation. Inmates in these facilities suffer overcrowded conditions, inadequate medical and psychiatric care, a lack of training opportunities, physical and sexual violence, racist practices, and inadequate or uncertain policies with regards to AIDS. The magnitude of the dilemma underscores the need for government intervention, litigation and more resources to combat the problem.

A. Overcrowding

Most experts in the field agree that overcrowded facilities and the resulting practices represent the most urgent problems in today's correctional institutions.[8] Indeed, many agree that state institutions are so crowded that conditions inside of virtually every prison system in America are at the brink of violating the Eighth Amendment.[9] "Judges find them-selves managing correctional institutions in these states as courts focus upon bringing the jails and prisons back into compliance with the Constitution."[10]

The overcrowding in correctional facilities simultaneously strains the physical facilities while eviscerating the capacity of prison staff to control the prison population.[11] In such an environment, living conditions for prisoners deteriorate and security often fails. This results in increased violence of prisoners toward each other, with a marked increase in woundings, murder, and homosexual rapes.[12] Guards are also often the victims as well as the perpetrators of such violent actions. Thus, **overcrowding must be considered not only a problem in and of itself, but a major contributing cause to other conditions that violate prisoners' rights.

B. Violence and Sexual Abuse

The prison environment has been characterized as certain "to bring out the most brutal, violent and sadistic tendencies in human nature."[13] Violence and sexual abuse have become a reality in many prisoners' daily existence. According to one source, from 1981 to 1983 there were 1,109 reported inmate assaults on other inmates and 797 reported inmate assaults on prison personnel.[14] Inmates are also particularly vulnerable to abusive behavior by corrections staff. In one case, a correctional officer wrapped a six inch-wide Ace bandage around an inmate's face, as a "disciplinary measure," ultimately causing his death by asphyxiation.[15] Prison staff nearby refused to intervene as the chained and shackled inmate writhed, gestured for help, and then collapsed.[16]

Sexual assaults are "the norm" in prison. Homosexual rape in prison has been described as "the most significant manifestation of prison unrest and violence."[17] Indeed, one commentator speculates that "virtually every slightly built young man committed by the courts is sexually approached within a day or two after his admission to prison."[18]

C. AIDS

The spread of AIDS through the United States has been magnified in the nation's correctional institutions. Inmates typically belong to high-risk groups or tend to engage in high-risk homosexual behavior.[19] Medical authorities point to prisons as the most likely environment for concentration of new cases.[20] Officials from the Centers for Disease Control predict that "prisons will become a hotbed of the virus unless something is done."[21] Considering the increase in the number of individuals entering prisons from high risk groups, particularly intravenous drug abusers, a "potentially explosive situation exists."[22]

D. Inadequate Medical Care

Lack of adequate medical, dental, and psychiatric care is common in penal institutions. Alvin Bronstein, the director of the ACLU's National Prison Project, identifies part of the problem as the lack of competent medical personnel to treat the thousands of individuals who pass through the correctional system each year.[23] Some of the most flagrant examples of individual constitutional violations include the failure to treat a prisoner diagnosed as having cancer, refusal of a warden to permit a prisoner to receive prescription medication, and the confinement of a prisoner with another known to have tuberculosis.[24] Another particularly shocking example involves noncertified and unqualified inmates using dental drills and equipment to perform work on inmate patients.[25]

E. Racism

Racism has also plagued the prison systems in America. "Racially discriminatory treatment of people of color outside of prison is often mimicked within the prisons."[26] Inmates are subjected to racial slurs from guards as well as fellow inmates. Prisoners are frequently placed in segregated facilities on the basis of their race. Muslims are often prohibited from practicing their religion.[27]

F. Nonrehabilitative Environment

Living conditions are unsanitary and unsafe. In West Virginia, for example, "the entire facility was infested with rats, lice, fleas, maggots and roaches and the living areas included a proliferation of rat feces and dead rats with fleas and lice."[28] The facilities often constitute "fire traps."[29]

Additionally, few prisons provide meaningful work,education or vocational training opportunities.[30] Many systems fail to provide literacy instruction and job training skills -- "elemental necessities for a decent life."[31] Overcrowding exacerbates the problems of idleness as the prisons are not able to absorb the growing labor pool.[32] Such an environment is hardly conducive to rehabilitation.

The conditions facing inmates of correctional facilities constitute a problem with which our society continues to grapple. Dostoevski once wrote that you can judge a society by the quality of its prisons. By this standard, we still have a long way to go.

II. Statement of Governing Law

The Courts and Prisoners' Rights

Throughout the history of the United States, the law has dealt with the issue of prisoners' rights in varying ways, often affected by institutional pressures and society's changing views on humane treatment. Once considered the scourge of society, only in the last twenty years have prisoners been increasingly recognized as having rights, and the minimum standards of human decency improved.

From the late nineteenth century through the mid-1960s, courts followed a policy of non-interference in prison administration.[33] Prisoners were considered no more than a "slave of the State", having surrendered their constitutional rights by committing and being convicted for a crime.[34] During this time, courts consistently refused to hear complaints from either convicts or detainees about their conditions of confinement.[35] The courts' refusal to interfere with internal prison administration became its basis for practically uniform refusal to enforce any constitutional rights for prisoners.[36]

In the late 1960s, lower courts embarked on a more enlightened role by employing the Eighth Amendment's ban on cruel and unusual punishment to hear claims involving confinement conditions.[37] The earliest cruel and unusual punishment cases concerned the excessiveness of individual sanctions, particularly solitary confinement for inmate misconduct.[38] By the 1970s, prisoners began to challenge conditions of confinement in the general population.[39] This led to claims that the total prison environment, or the "totality of conditions" endured by inmates, constituted cruel and unusual punishment.[40]

In reviewing totality cases, courts examined the total penal environment, including ventilation, fire hazards, noise, illumination, sanitation, protection from violence, overcrowding, medical care, quality of food, clothing, and physical recreation.[41] Having determined the scope of inquiry in totality cases, courts appeared to engage in an *ad hoc* process of review, requiring that conditions not "shock the conscience" or cause "denigration."[42]

While lower courts were adopting an interventionist stance in Eighth and Fourteenth Amendment due process cases, the Supreme Court became increasingly non-interventionist, urging the district courts to engage in greater self-restraint.[43] The Court first embraced the principle of "due deference" in 1974 in *Procunier v. Martinez.*[44] In *Procunier*, despite ultimately finding for the plaintiffs, the Court in *dicta* praised judicial reluctance to interfere with internal prison administrative matters as reflecting a "healthy sense of realism."[45] The Court used the concept of due deference in *Martinez* to caution lower courts to confine their review to constitutional questions.[46]

Decisions in the late 1970s and early 1980s relating Eighth Amendment concerns to prison conditions have suggested return to the "hands off" attitude of the courts of the early 1960s. Judicial restraint was emphasized in the two major Supreme Court decisions.[47] These cases stressed the need for federal courts to exercise great caution before intervening in the administration of state institutions, recommended keeping any such involvement to a minimum, and encouraged real deference to the decisions of state penal administrators in the operation of their institutions.[48]

While some lower courts subsequently have taken the view that "an institution's obligation under the Eighth Amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care and personal safety,"[49] other courts have gone further in examining the total effect each condition has on the prison environment.[50] The Supreme Court, however, has fundamentally altered the seriousness of what must be shown to establish a violation, and raised the level of what the courts will consider cruel and unusual.[51] Remedies have also recently been limited to only "what is absolutely necessary" to correct the violation,[52] and costs have become a relevant factor in determining what relief is ordered.[53]

In analyzing the Reagan record in the area of prisoners' rights, it is necessary to keep this reemergent "hands off" judicial philosophy in mind. It must also be noted, however, that rather than struggling against this trend, the Reagan Civil Rights Division has endorsed and, indeed, has encouraged this non-interventionist approach.[54]

B. The Government's Role in Addressing Responses to Civil Rights Abuses

To respond to civil rights abuses, the executive branch in 1957 created within the Justice Department a specialized Civil Rights Division.[55] Subsequent presidential administrations have consistently encouraged the Civil Rights Division to address the most flagrant infringements of prisoners' constitutional rights.[56] When compliance with the 1964 Civil Rights Act's anti-discrimination in public facilities provision became more widespread, the Civil Rights Division began, in 1970, also to focus upon institutional litigation.[57]

The expansion of civil rights enforcement authority led to the creation of the Office of Institutions and Facilities in 1971, which later merged into the newly created Special Litigation Section.[58] This arm of the Civil Rights Division devotes the majority of its resources towards eliminating widespread violations of the rights of persons institutionalized in state and local penal, mental health, and juvenile facilities.[59] The Special Litigation Section had, by 1980, emerged as the country's most significant protecter of the rights of the nation's more than one million institutionalized persons.[60]

In 1978, the Special Litigation Section had two of its actions dismissed on the grounds that the United States lacked standing.[61] Although commending the government for its laudable effort to ensure humane treatment for institutionalized persons, the courts held that the United States could not bring suit to protect the rights of institutionalized persons without express statutory approval.[62] These decisions effectively limited the Special Litigation Section's ability to initiate actions alleging violations of institutionalized persons' constitutional rights.

In response to repeated public disclosures of life-threatening, cruel and dehumanizing conditions in the nation's public institutions,[63] Congress recognized the need to confer standing upon the federal government to sue to correct these egregious conditions. Former Assistant Attorney General for Civil Rights, Drew S. Days, III, urged Congress to pass legislation authorizing the Civil Rights Division to bring litigation in its own right.[64] In 1980, Congress passed the Civil Rights of Institutionalized Persons Act (CRIPA).[65]

C. CRIPA

The Civil Rights of Institutionalized Persons Act gives the Attorney General the authority to initiate action on behalf of civilly and criminally institutionalized persons where the government believes "egregious or flagrant" conditions exist that deprive individuals of their federally protected statutory and constitutional rights.[66] While CRIPA accords the Attorney General with standing to assert the rights of institutionalized persons, the statute also contains a procedural burden limiting the government to enforcing federal and constitutional rights only in those institutions that have demonstrated a "pattern or practice" of serious violations.[67] Robert Plotkin, who implemented CRIPA during the waning months of the Carter administration, testified before a Congressional subcommittee in 1983:

> [T]he legislation represents an important legislative commitment on behalf of the United States, by protecting an entire class of previously unprotected and helpless citizens. There very likely is no similar legislation anywhere in the world.[68]

The Carter Administration only had a short period of time to work with the new legislation. In 1980, President Reagan won a resounding victory and enforcement of CRIPA was handed over to a new Civil Rights Division under the leadership of Assistant Attorney General William Bradford Reynolds.

III. Philosophy of The Reagan Special Litigation Section

William Bradford Reynolds, the Assistant Attorney General in the Reagan Civil Rights Division, has asserted that "[s]ince enactment of CRIPA in 1980, the record compiled by [our Special Litigation] section is one that . . . shows solid accomplishment."[69] "I think we are enforcing CRIPA as diligently as it can be enforced."[70] While these statements have been widely disputed, and will be directly addressed in the next section of this report, it is important to understand at the outset the fundamentally different perceptions of CRIPA in the Reagan and Carter administrations.

While the Carter Administration saw CRIPA as a tool by which the federal government could take an activist role in maintaining and enforcing humane conditions within the nation's corrections institutions, Mr. Reynolds has adopted a much more limited view. Testifying before the 1983-84 Congressional hearings on CRIPA, Mr. Reynolds stressed:

> [W]e must be always mindful that it is, in the final analysis, the responsibility of State officials to operate and maintain these facilities . . . . It would emasculate CRIPA were we to wrench it from its constitutional underpinnings in such fashion and expansively interpret it to extend beyond the kinds of egregious and flagrant activity Congress intended the statute to reach.[71]

As a result of this federalist approach, many of the remedies sought by previous administrations have been eschewed by Mr. Reynolds, who instead sees the Special Litigation Section's role as securing only the "minimum corrective measures necessary to protect the inmates' constitutional rights."[72] Such minimum corrective measures, in Reynolds' view, do not include the imposition of population levels, or any other precise measures for alleviating overcrowding.[73]

This new philosophy led to a series of procedural and regulatory actions. On July 16, 1981, for instance, the Reagan Justice Department, without providing opportunity for public comment, amended regulations, promulgated pursuant to CRIPA by the Carter administration,[74] which set forth inmate grievance procedures. These amendments limited inmate participation in grievances, eliminated provisions for outside review of grievances and otherwise limited the requirements imposed upon state and correctional officials.[75] On July 23, 1981, Attorney General Smith withdrew the preamble to Federal Standards For Prisons and Jails, which the previous administration had issued.[76] The preamble to the Federal Standards provided that the objectives and standards promulgated therein would ultimately be met by federal penal institutions and would guide the department in challenging conditions of confinement in state and local prisons. In explaining the withdrawal, Smith emphasized that "[p]enal institutions are free to utilize these guidelines or not as they see fit" and that "[t]hese standards create no legally enforceable rights or expectations of any kind."[77] Thus, the withdrawal of the preamble by Smith in essence rendered the Federal Standards for Prisons and Jails mere precatory language.

This new philosophical approach can be seen in other non-litigation areas as well. For example, the Reagan Administration has repeatedly sought the elimination of grants distributed by the Office of Juvenile Justice and Delinquency Prevention. In explaining the Administration position in 1984, Richard B. Abell, a deputy assistant attorney general with the Office of Justice Assistance, Research, and Statistics, emphasized federalist concerns:

> Many excellent improvements have been made in the juvenile justice system as a result of the federal leadership, and we now believe it is time for the federal leadership to step aside and encourage the state and local governments to define a successful program.[78]

Mr. Reynolds' highly restrictive interpretation of *Youngberg v. Romeo*,[79] further illustrates the Reagan Civil Rights Division's emphasis on nonintervention. Despite the contrary views of most of the legal community and members of his own legal staff, including Arthur Peabody, Jr., then Acting (now full) Chief of the Special Litigation Section,[80] Mr. Reynolds read the *Youngberg* opinion as a rejection of a constitutional right of institutionalized persons under the Fourteenth Amendment to "minimally adequate habitation:" Thus, the Court [in *Youngberg*] made it clear that it was not the proper function of the Judiciary to "second guess" the State's exercise as to what care might be needed to insure an institutionalized person's safety. The federal government's role in this area must be exceedingly circumspect . . .[81]

The Reagan/Reynolds philosophy has led to an unprecedented shift in public and legal perception of the Special Litigation Section. Traditionally a leading force and champion of institutionalized person's rights in Republican and Democratic administrations alike,[82] the Special Litigation Section during the Reagan administration has come to be seen by many as an enemy of these interests. In the 1983-84 Congressional Hearings on the Institutionalized Persons Act, Congressman Don Edwards (D-Ca.) noted:

> For the first time since the Civil Rights Division was created in 1957, some representatives of these protected classes have asked that we dismantle the Civil Right Division of the Department of Justice.[83]

In the same hearings, Timothy M. Cook, an attorney who had served under Reynolds in the Special Litigation Section for nearly three years, testified:

> It is not really just that the Department of Justice has stopped enforcing the law . . . what also has happened is that the Department of Justice has urged the courts to cut back on civil rights that were previously realized by the people confined to these institutions.[84]

Organizations such as the National Prison Project of the American Civil Liberties Union, which for years had fought cases side-by-side with the Civil Rights Division and the Special Litigation Section, have suddenly found the Justice Department on the other side of the aisle. Adjoa Aiyetoro, an attorney for the National Prison Project, who had previously worked in the Special Litigation Section, stated bluntly: [W]e hope that the Reagan Justice Department doesn't use the Institutionalized Persons Act. The way its being used, CRIPA has become a detriment to prisoner's rights."[85]

The full impact of the shift in the Special Litigation Section's philosophy can be seen through its action in the cases in which it has been involved. In many of these cases it has become quickly apparent that the Special Litigation Section is no longer representing the interests of the institutionalized persons. One of the first indications of this shift came in *Ruiz v. Estelle*,[86] where the Special Litigation Section essentially urged reversal of an order which, under President Carter, it had advocated in the lower court, because it would "unduly interfere with the operation of the State's prison system."[87] Another such case was *Gates v.Collier*.[88] In *Gates*, the trial court *sua sponte* dismissed the United States as plaintiff intervenor with respect to all issues relating to the use of county jails in Mississippi for the confinement of state prisoners. The court explained its dismissal as follows:

> [T]he Department of Justice has clearly indicated that the litigation interests of the United States is not in accord with current orders of this court concerning the use of county jails by the defendant officials and that the government does not propose to be bound thereby. The court finds that the interests of the United States in this cause are no longer coextensive with or common to the interests of the plaintiff class.[89]

In another case, *Gary W. v. State of Louisiana*,[90] the plaintiff class expressed its growing concern at the positions taken by the Justice Department:

> [I]f DOJ persists in its new posture as guardian of the federal executive branches or defendants' interests, then the plaintiff class will have no choice but to move for DOJ's dismissal from this case.[91]

In *Battle v. Anderson, Inc.*,[92] the private plaintiffs counsel for the class of prisoners went beyond merely expressing concern and asked the court to remove the Department of Justice, charging that, "[a]ttorneys for the United States have abdicated their lawful role in this litigation."[93]

Perhaps the most telling sign of the Justice Department's new position came in *Block v. Rutherford*.[94] In *Rutherford*, pretrial detainees at the Los Angeles County Central Jail won a judgment allowing contact visits for low risk pretrial detainees who had been incarcerated for more than thirty days and requiring that inmates be present during general searches of their cells. This judgment was affirmed by the Ninth Circuit. On *Writ of Certiorari*, the Justice Department filed an *amicus* memorandum under CRIPA to the United States Supreme Court siding with the Sheriff of Los Angeles County against the plaintiffs.[95]

In his February 8, 1984 testimony before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice during the 1983-84 Congressional Hearings on CRIPA, Mr. Reynolds highlighted one case, *United States v. Michigan*, as a success of the new non-intrusive Special Litigation Section philosophy:

> On January 8, 1984, Division lawyers and Michigan State officials concluded extended negotiations resulting in a consent decree that fully vindicates the Federal rights of some 7,500 inmates housed in three Michigan prisons . . . . This is the first major consent decree obtained under CRIPA on behalf of prison inmates; i.e. it represents the proper balance required by the statute of a Federal enforcement commitment to redress constitutional wrongs, on the one hand, and a State enforcement commitment to treat with a variety of other institutional concerns that deserve attention under State laws and local health and state codes, on the other hand. As a consequence, the rights of those incarcerated in the Michigan prison system will finally receive a full measure of protection.[96]

While it is dangerous to extrapolate too much out of a single case, the prominence given to Michigan both by Justice Department detractors and supporters indicates that an analysis of this case would accurately reflect the overall record of Reynolds' Special Litigation Section.

The Michigan action began on October 9, 1981 when the Justice Department, pursuant to CRIPA, notified Michigan Governor William G. Milliken of its intent to investigate conditions in Michigan's three maximum security facilities.[97] After two years of investigation, Justice Department line attorneys and the State of Michigan reached agreement in a 54-page consent decree which detailed health, safety, inmate training, sanitation, physical plant and other plans to be implemented by the State and provided timetables for such implementation. Bradford Reynolds, however, vetoed the consent decree and replaced it with a five-page consent decree that required only that Michigan provide "minimally adequate" sanitation, health care, legal access, fire safety and security. The original 54-page document was attached as a "voluntary" state plan.[98] The difference between the original decree and the replacement decree lay not so much in the precise deficiencies that needed addressing, but rather in the amount of involvement necessary to correct the deficiencies. Mr. Reynolds, as expressed above, based his actions firmly on federalist principles and boldly announced that he was "very proud of the [five-page] consent decree ... [as it] really promises to clean up constitutional infirmities in those prisons promptly."[99] Mr. Reynolds, however, was virtually alone in this assessment.

Both Justice Department line attorneys who had negotiated the original consent decree refused to sign Reynold's replacement degree. Within a few months, both attorneys left the Special Litigation Section.[100] Kenneth Schoen, the corrections expert hired by the Justice Department to investigate conditions in the Michigan prisons, filed an affidavit with the court in which he dismissed the 5-page decree as ineffective and no more than "a set of polite suggestions" to Michigan.[101] Immediately following the signing of the new consent decree, two private groups, the National Prison Project of the ACLU and private attorneys representing Michigan prisoners in a separate suit,[102] motioned for and obtained *amicus curiae* status from the court, arguing in part that the United States was not representing the interests of Michigan prisoners.[103] The National Prison Project subsequently initiated a separate action, *Knop v. Johnson*,[104] because of the Justice Department's continuing insistence in support of its five-page decree.[105]

Members of Congress were no less critical. Congressman Robert W. Kastenmeier (D-Wi.) directly contradicted Reynolds' portrayal of Michigan stating that:

> [T]he Michigan prisons case . . . was not brought successfully to a conclusion and was complained about . . . and indeed may be complained about again . . . [I]t is suggest[ed] that [Mr. Reynolds] had undercut, literally, what [his] own attorneys had achieved with the state . . . .[106]

Congressman John Conyers, Jr. (D-Mi.) asserted:

> *What you (Mr. Reynolds) are doing is sort of a landmark. It is being interpreted as turning the clock back some 15 years in these kinds of matters. We have now the State of Michigan solely responsible for monitoring compliance of a section of the plan when before, there were other parties, including the State and probably the court, that could have so done.*[107]

The final word on the consent decree heralded by a Justice Department press release as a model for future litigation[108] came when U.S. District Court Judge Enslen of the Western District of Michigan rejected the proposed decree. Judge Enslen explained his decision as follows:

> I realize that I have only been in the profession twenty-six years, but I have never seen a consent, five-page document like this five-page document. I couldn't read it. I couldn't decide what I was doing or what I was being asked to do. It didn't seem like I was being asked to do anything . . . . The point is that in its present form it seems to me that I do nothing by signing the five-page consent decree. I don't know what it means, and if I don't know what it means, I can't see how anybody else does.[109]

The Court ordered that a new consent decree be drafted within thirty days and submitted both to the Court and to the two *amicus curiae*

The State of Michigan responded by drafting a new consent decree that, like the original 54-page decree, made the entire "state plan" enforceable in court. Amazingly, the Justice Department refused to accept this plan and instead proposed a new eight-page consent decree which again incorporated the "state plan" as voluntary. To demonstrate the importance of the case, Mr. Reynolds himself argued before the court on behalf of this decree. Judge Enslen, however, again refused to accept the decree and mandated that it be modified so as to make the "state plan" enforceable in court. The Justice Department finally relented and the new consent decree was approved by the court on June 22, 1984.[110]

In the four years that have followed, the United States has consistently sided with the State of Michigan, and against the *amicus curiae* or the Court. The United States has repeatedly opposed the involvement of the *amici*, often to the confusion of the court.[111] It opposed the court's decision to appoint a special master to help the court ascertain whether the consent decree was being implemented, arguing that "the appointment of a special master would invade unnecessarily the province that the parties have reserved for less intrusive means of resolution."[112] On a number of occasions it has argued positions which should or could have been argued by the State of Michigan.[113] While it is true that the Court has commended the United States for improving its compliance enforcement efforts in some areas,[114] the sad truth as stated by Adjoa Aiyetoro, Michigan counsel for the NPP, is that the Michigan consent decree--nominally enforced by the United States Justice Department--has been enforced "almost solely through the efforts of the *amicus curiae*."[115]

In his testimony at the 1984 Congressional Hearings, Stephen A. Whiston, a former attorney at the Civil Rights Division and Special Litigation Section from 1974 through 1983, summed up the views of many observers of the Reagan Justice Department. "[T]he bottom line is that the Department which was set up to advocate for the rights of the institutionalized no longer sees itself in that role. Instead the predominant motivation of the current Administration seems to be to insure that the federal government and the federal courts limit their impact on the lives of citizens. It is to assure that state governments, the defendants in Justice's suits, are not "overburdened" by "intrusive" federal court orders or "overzealous" plaintiffs' counsel. The whole orientation of the Justice Department's litigation in this field has changed from enforcing the rights of the institutionalized to establishing what are the limits of a state's obligations to the institutionalized.[116]

IV. Failure to Enforce CRIPA

A. The Current State of CRIPA Enforcement

Where enforcement of CRIPA has not been condemned as counter-productive, the Act has been "largely viewed by the corrections community as irrelevant."[117] Mr. Reynolds' interpretation of the Act coupled with internal policies of the Department of Justice have chilled the enforcement of prisoners' civil rights. The statistics concerning enforcement under CRIPA serve as testimony to the consequences of Reynolds' policies.

The lack of CRIPA enforcement has been driven by Mr. Reynolds' overriding concern with issues of federalism. As a result of the primary importance placed on non-intervention and non-intrusiveness in state and local decision making, there has been very little activity under CRIPA during the Reagan Administration.

B. Statistics of Enforcement

The enactment of CRIPA in 1980 provided the Justice Department with a congressional mandate to initiate, investigate and litigate civil rights violations against institutionalized persons. While CRIPA also provides procedures for negotiation with state and local authorities, the Justice Department already had the authority to pursue these actions without the new legislation. Therefore, CRIPA has been viewed by many, including attorneys in Reynolds' Civil Rights Division, as being primarily motivated by the congressional intent to provide the Justice Department with standing to litigate issues of institutionalized persons' civil rights following adverse court decisions in *Mattson* and *Solomon*. In 1979, while advocating enactment of the legislation, the Carter Justice Department reported to Congress that they expected the number of lawsuits filed under CRIPA to be no more than seven to ten a year.[118] Thus, it seems clear that Con gress viewed CRIPA as a means by which the federal government could become more involved in protecting the civil rights of institutionalized prisoners.

In the past seven years under Assistant Attorney General Reynolds, however, the Special Litigation Section has taken a less active role in enforcing the civil rights of institutionalized persons than past administrations even prior to CRIPA. During 1975, President Ford's first full year in office, the predecessors to the Special Litigation Section appeared as *amicus* or intervenor in about twenty new cases concerning the rights of institutionalized persons. In 1977, President Carter's first full year, the Section filed eleven new cases and intervened in three others. In contrast, the Reagan Administration, armed with the newly enacted CRIPA, did not file its first complaint until its fifteenth month.[119]

The Civil Rights Division under Reynolds has presented itself as actively pursuing cases of constitutional violations of the rights of institutionalized persons. In a Justice Department review of enforcement measures in the Civil Rights Division during the first six years of the Reagan Administration, the Division reported: "Since enactment of the statute, the Division has reviewed complaints from over 400 facilities and initiated 86 CRIPA investigations involving 95 institutions housing some 100,000 persons. Investigated facilities can be found throughout the United States and its territories."[120]

While many would argue that eighty-six investigations in six years hardly suggests a vigorous enforcement record, especially in light of the 1979 Justice Department estimates by which one could expect nearly as many new cases in litigation, a closer look at the record reveals that even this claim may overstate the Civil Rights Division's activity under Reynolds. First, as many as thirteen of these eighty-six investigations were initiated at the end of the Carter Administration. Second, only five of the eighty-six investigations resulted in litigation that was pending against states as of the date of the report. Third, thirty-three of these investigations were still pending; of the rest, a majority had been concluded either through voluntary action by the state, a judgment in a separate private litigation or a finding of no constitutional violation.[121]

While statistics may not always provide a complete picture, the numbers with regard to CRIPA prisoners' rights activity in the Reynolds era seem disappointingly low. In their first three months of fiscal year 1981, while Carter was still in office, the Special Litigation Section opened six new investigations (approximately two per month) under CRIPA involving the rights of inmates in correctional facilities (i.e., prisons, jails, juvenile halls). In the subsequent sixty-nine months under Reagan, the Section opened only twenty-eight such investigations (approximately one every two-and-a-half months). Thus, new investigations were opened during the first six years of the Reagan Administration at only one-fifth of the rate during the admittedly short period of enforcement of CRIPA under Carter.[122]

Of the thirty-four above mentioned investigations opened from 1981 to 1986, only five resulted in a consent decree that was being enforced by the courts at the end of fiscal year 1986. Thirteen of the investigations had been closed: five as a result of voluntary action taken by states; four due to findings of no constitutional violation; and four as result of settlements or judgment reached in related, but separate, private litigation. Sixteen investigations were still pending.[123] Not one prisoners' rights case was litigated to resolution during the entire period.[124] Thus, even assuming that all investigations resulting in consent decrees or voluntary state action were successes for prisoner's rights -- a highly dubious contention[125] -- the Reagan Civil Rights Division could point to only ten successfully concluded investigations in its first six years.

In reviewing the record of enforcement under CRIPA in February of 1984 and noting that only four suits of any kind had been filed, Representative Edwards concluded that this was a "dismal record, especially when compared to the [Justice] Department's exemplary record of protecting the rights of institutionalized prisoners before the enactment of this legislation."[126] Even given CRIPA's mechanism for preventing overly intrusive Federal intervention in the states' affairs, many agree that the Reagan administration has ignored the congressional purpose, intent, and plain meaning of CRIPA by its failure to implement the legislation.[127]

C. Interpretation of CRIPA

Mr. Reynolds' concerns with Federalism have led him to interpret CRIPA as limiting the nature of the Department's sanctions.[128] Mr. Reynolds, where he has taken action at all, has virtually shunned litigation in favor of negotiation and conciliation. Mr. Reynolds defends his approach to enforcement under CRIPA by citing the Act's procedural requirements which call upon the Attorney General to undertake negotiation and conciliation with state officials before engaging in litigation:

> [A]n emphasis on conciliation, rather than litigation is of course, the [approach]contemplated by Congress under the CRIPA scheme .... Lawsuits were included as a weapon to be used against recalcitrant and uncooperative officials, but Congress required under CRIPA that, before the Attorney General resorts to the courts, he be in a position to certify that its procedural requirements have been satisfied and that every effort to reach a negotiated resolution of the case has been exhausted.[129]

An emphasis on negotiation and conciliation, according to Mr. Reynolds, produces better results than does protracted litigation. The emphasis on remedying unconstitutional conditions through negotiation and conciliation has the additional advantage, according to Mr. Reynolds, of avoiding the problem of misallocation of resources that accompanies antagonistic litigation.[130] Thus, Mr. Reynolds' interpretation of CRIPA dictates the use of litigation only as a last resort.

Mr. Reynolds' reading of the Act, however, is highly restrictive. CRIPA does not require that the Justice Department make "every effort" at conciliation and negotiation; rather it states only that the Department must engage in "reasonable efforts." By placing such a limiting interpretation on CRIPA, Mr. Reynolds has caused the Special Litigation Section to pursue months and even years of often fruitless negotiations while not taking any independent action to enforce the rights of prisoners.

The Department's enforcement of prisoners' rights almost solely through negotiation and conciliation has been widely criticized as ineffective. In his testimony before the Subcommittees on Courts, Civil Liberties and the Administration of Justice and Civil and Constitutional Rights, Robert Plotkin agreed that CRIPA does first require that the Department proceed through negotiation. He subsequently emphasized, however, the pitfalls of pursuing negotiation absent the threat of litigation:

> But as any practicing lawyer will tell you, efforts to negotiate are never going to be very successful unless the people with whom you are negotiating believe that at the end of that process, if you are not going to get most or part of what it is you are looking for, if you are not going to file a lawsuit, if you are not going to be vigorous, and aggressive in protecting the rights of essentially your clients, then there is no incentive on the part of the States to negotiate, discuss, and make improvements.[131]

The Senate Judiciary Committee has also concluded that, "[e]xperience has shown . . . that litigation is . . . the single most effective method of redressing systematic deprivations of institutionalized persons' constitutional and federal statutory rights."[132]

The problems with Mr. Reynolds' policy of negotiation until the last possible moment are illustrated by the *Newark* case. In April of 1982, after conducting a full investigation, Justice Department attorneys concluded that conditions in the Newark, New Jersey jail were as bad as in any jail in the country and recommended that a suit be initiated.[133] It was not until almost two years of fruitless negotiation, however, that the Department finally filed suit.

Mr. Reynolds' non-interventionist tendencies have hindered the actions of the Special Litigation Section. Rather than risk intervention where a constitutional violation may not ultimately be proved to exist, Reynolds has often delayed or vetoed actions under CRIPA that were clearly justified. One such instance came during the proposed investigation of the Biloxi jail in Mississippi. In April, 1981, Robert Plotkin, then Chief of the Special Litigation Section, authorized an investigation of the Biloxi jail. The order was countermanded from above because it involved a matter "that plaintiffs work out with the State; the federal government didn't have an interest in that."[134] By the time the investigation was ultimately approved in September 1982, it was too late to prevent the tragic fire that occurred just several weeks later in the Biloxi jail, where 29 inmates were killed.

Further illustrating Mr. Reynolds' approach to enforcement was the Special Litigation Section's investigation of the Wisconsin prison system. On June 17, 1982, Reynolds wrote a letter to Wisconsin Governor Dreyfus indicating that a Justice Department investigation had found serious inadequacies in the prisons' medical care, mental health facilities, sanitation and emergency services.[135] On January 26, 1983, the Wisconsin prison authorities sent back a response which detailed some policy changes, but nonetheless, defended the status quo.[136] Five days after this response, an uprising occurred at the Waupun prison in Wisconsin. Despite this fact, and Reynolds' acknowledgment that "some aspects of the State's response were troubling," the Special Litigation Section decided not to pursue the matter.[137]

D. Internal Policies Effect Enforcement Under CRIPA

Mr. Reynolds' disavowment of litigation and other intrusive actions has not been the only hurdle to enforcement of civil rights for institutionalized persons during the Reagan Administration. The internal policies promulgated by the Reagan Justice Department limiting the freedom and discretion of Special Litigation Section line attorneys have also been major contributory factors to the failure of enforcement action under CRIPA.

Early in his term, Mr. Reynolds circulated a memorandum to his staff mandating that all decisions reflecting litigation tactics or policy, however small, must be approved by the Section's supervisory staff: "[W]hile I am in the process of reformulating current division policy in certain areas, and until further notice, I am directing that all substantive pleadings and memoranda be provided to the Deputies for review at least 24 hours prior to the filing date.[138]

Although the purpose of this directive was purportedly to enable Reynolds to "familiarize himself" with the operation of the Section as he commenced his new duties,[139] there is no indication that the directive was ever discontinued.[140] As a result, Reynolds and his immediate subordinates review most pleadings, spending much of their working days editing and directing technical staff decisions, thus occasioning great delay in enforcement.

On May 27, 1981, Attorney General Smith further tightened controls over the independence of line attorneys to litigate prison cases by ordering that:

> [T]he Civil Rights Division is directed to obtain the recommendation of the Bureau of Prisons in connection with all important pleadings in sufficient time to ensure their meaningful participation . . . This directive . . . applies to all pending cases as well as those not yet filed.[141]

On November 23, 1982, Mr. Reynolds instituted a policy "against intervening in ongoing lawsuits where plaintiffs are adequately represented and have properly framed their litigation to raise the relevant constitutional issues."[142] This policy fit neatly within Mr. Reynolds' partisan political ideology of non-intervention by the federal government in the area of civil rights. In Mr. Reynolds' view, it is more desirable for private parties to undertake prison litigation.[143] What he ignores, however, are the tremendous resources the Justice Department could bring to bear in conducting complex prison litigation, as well as the Department's national perspective and prestige.[144]

The Civil Rights Division's continued refusal to enforce CRIPA has left prisoners' rights litigation to be conducted by understaffed and underfunded public interest lawyers.[145]

These administrative hurdles, together with the lack of enforcement activity pursuant to CRIPA, contributed in large part to a nearly 100-percent turnover in the Special Litigation Section's legal staff during the first term of the Reagan Administration.[146] According to one departing staff attorney: "[N]one of us were willing to put up with Reynolds' massacre of civil rights."[147]

While turnover is expected in government service, normal attrition cannot account for the experience in the Special Litigation Section. Robert Plotkin, a former Special Litigation Chief familiar with many of the departing staff, explained the high number of resignations as follows:

> Not every one of these conscientious men and women were 'zealots', eager to sue the offending states. Most were true professionals who sorted the wheat from the chaff, who evaluated claims on their merits and who made good faith recommendations to take or not to take certain actions. Many were hired during prior Republican administrations. Yet, normal attrition cannot account for this turnover. These were people who were so disturbed by the things they saw in the institutions and so upset by the lack of commitment by their leaders to correct these problems, that many of them had no choice but to leave.[148]

In late 1983 and early 1984, the House Subcommittees on Courts, Civil Liberties, and the Administration of Justice, and on Civil and Constitutional Rights held hearings to investigate the reports of non-enforcement of CRIPA and the abandonment of vigorous civil rights protections for institutionalized persons by the Reagan Justice Department. The Congressional Subcommittee heard testimony from numerous experts in the field of institutionalized persons' rights and reviewed voluminous documentary materials from both within and without the Justice Department. Most of the comments were highly critical of the Reagan administration record. Repeatedly, Congressmen, Republican and Democrat alike, voiced their concern and alarm at the Reynolds record.

Despite ths clear signal of congressional displeasure, activities in the Special Litigation Section continued virtually unchanged during Reagan's second term. While the statistics show a slight increase in new investigations, the level of activity remains low. Recent actions in *United States v. Michigan* and other cases[149] have shown that the Reagan Civil Rights Division still opposes private civil rights attorneys who should be its natural allies. Furthermore, with the complete turnover of legal staff in the Special Litigation Section, there is virtually no experience or institutional memory.

V. Emerging Issues

The next administration will be faced with several emerging issues in the area of prisoners' rights. Perhaps the most difficult problems for the prisoners of the '90s will be overcrowding and the AIDS epidemic. Resolution of these problems will require more than a renewed commitment. It will require intelligently conceived and consistently pursued policies.

Most experts in the field are in agreement that construction of more facilities will not solve the overcrowding crisis. One commentator refers to construction as an illusory "self-fulfilling prophesy" since studies have shown that every new prison built is filled to 130 percent capacity within five years.[150] Instead, experts focus upon the scores of inmates who are presently incarcerated but present no real threat to society.

Perhaps Donald Murray, the Director of the Criminal Justice Program, stated it best. He noted that a realistic approach to solving the jail crisis: requires expanded use of alternatives to incarceration, new and effective partnerships between state and county governments, better linkages between criminal justice and health and social service agencies; comprehensive system-wide planning, well-conceived sentencing guidelines, and funds to improve facilities.[151]

In search of an explanation for the current prison overcrowding crises, Edward Hennessey attributes the problem to the fact that, "in the past decade, the theoretical purpose of sentencing has shifted from rehabilitation and treatment to punishment and retribution. . .in tandem with the widespread development of get-tough sentencing laws."[152] Hennessey explains that parole and probation have been deemphasized, as mandatory sentencing laws and determinate sentences have proliferated.[152] The prison population has shot through the roof; in the last 10 years, it has doubled. The public has not been willing, however, to fund new prison capacity; available space lags far behind what is needed.[154]

With the public urging officials to lock up criminals and throw away the key, legislation has passed providing for more stringent punishment and mandatory sentencing. The public has not been cognizant of the overwhelming burden such policies place upon the correctional institutions.[155] Legislators are caught between the demands for more severe sanctions and a lack of funds for building new facilities or renovating the existing ones.[156]

Various remedies have been implemented. In Michigan, for example, legislation has been enacted which sets forth a formula for automatic release of certain prisoners when overcrowding reaches a certain level.[157] Other jurisdictions have resolved to build more prisons.[158] In 1970, $74 million was expended in prison construction; in 1982 the figure stood at $946 million.[159] In a few places, there is resistence to sentencing laws which demand more and longer incarcerations (i.e., the adoption of presumptive rather than mandatory sentences).[160] Restitution, specialized probation, community service, halfway houses and the discriminalization of certain offenses represent popular alternatives to incarceration.[161]

The AIDS epidemic promises to pose an even more perplexing legal and political dilemma. As noted above, the AIDS epidemic has already led to a increase in legal complaints filed alleging violation of constitutional guarantees. Several lawsuits have been filed by AIDS diagnosed inmates alleging that they received inadequate and discriminatory medical care (e.g., medical segregation, deliberate indifference to their medical needs fostering serious depression and deterioration in their medical conditions).[162] Other suits have been filed alleging that correctional institutions have failed to protect others from inmates with AIDS.[163] Suits have also been filed by AIDS patients alleging denial of equal protection (e.g., segregation in isolated units).[164] Clearly, more precise guidance is needed in order to determine what constitutes the minimum level of "adequate medical care" that is required under the Eighth Amendment.[165]

Perhaps states should follow the lead of the New York Department of Health in establishing regulations governing the treatment and care of AIDS-diagnosed inmates.[166] Other states recommend following the standard procedures already in place for other communicable diseases in institutional settings.[167] A few institutions distribute prophylactics to their inmates.[168]

Whatever the resolution of these issues, it is beyond question that the federal government can play an increased role in prisoners' rights matters. Clearly, there is a need for more litigation and a need for the government to adopt a more aggressive approach in utilizing CRIPA. For example, with respect to jail overcrowding, at least one commenator has concluded that a renewed emphasis on litigation is essential if the problem of prison overcrowding is to be remedied. In a recent paper, John N. Hauser concluded that despite the variety of remedies advocated by leading experts in the field, "much of the problem will not be attacked vigorously or sometimes at all unless there is the threat or actuality of litigation."[169]

The Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 has been labeled "the lynchpin upon which is built the Justice Department's enforcement of the rights of the institutionalized."[170]

> It is the Act which provided the Justice Department with the mechanism or procedure to effectuate changes in our nation's institutions. And it is through the Act that the Department expressed its substantive positions on the rights of the persons in whose behalf it is authorized to advocate.[171]

According to Whiston, Mr. Reynolds' pursuit of the "reasonable efforts at voluntary correction" required under the Act, reflects a "tendency to allow operators of unconstitutional facilities great leeway in the negotiation process."[172]

> Given the massive nature of the violations uncovered and the major remedial efforts necessary to correct the situation, litigation is a necessary tool not only to initially achieve a remedy but also to insure that the remedy is not transitory.[173]

Clearly, there is a need for the next administration to adopt a more aggressive policy in utilizing CRIPA.

Even in the areas that clearly fall under state control, the federal government can push for new approaches which might solve the problem in this country's prisons. For example, Professor John J. DiIulio, Jr., a professor at Princeton University, points to "absent or unstable leadership" in correctional facilities which he characterizes as "corrections chiefs playing musical chairs," as a source of the problem.[174] Citing statistics that "between 1973 and 1987, less than one-third of all adult corrections agencies had commissioners with an average tenure of five years or more" DiIulio contends that "**so many of the nation's prisons are crowded, filthy, violent and unproductive because so many of its corrections agencies are without stable, caring, and creative executive leadership".**[175] He attributes the high turnover to a quick burnout rate noting, "a prison director is beating the odds if he stays in his post long enough to break in his staff, establish alliances with legislators, and orchestrate a single positive change in conditions behind bars.[176] While the federal government cannot mandate terms of office for prison commissioners, it could serve as a clearinghouse for suggestions, such as DiIulio's, to help the states make more informed decisions.

Chapter XXIV

FEDERAL ENFORCEMENT OF CIVIL RIGHTS LAWS DESIGNED TO PROTECT INDIVIDUALS WITH DISABILITIES

by Bonnie Milstein

> *The recent progress that people with disabilities have made toward being accepted into society...has paralleled the integration of African-Americans into mainstream America Just as the Civil Rights Acts...were invaluable in moving America toward a more open society, so have been the civil rights laws passed on behalf of people with disabilities.*

Introduction

After centuries of avoidance and neglect, Congress enacted a law in 1973 which acknowledged that discrimination against people with disabilities was an accepted--largely unquestioned fact--of American social behavior. The law, Section 504 of the Rehabilitation Act of 1973, prohibited the use of federal funds and assistance to support or to perpetuate such discrimination. Congress purposely adopted the language of Title VI of the Civil Rights Act of 1964 to craft its prohibition against discrimination on the basis of disability. It did so to underscore the law's message: that discrimination against people with disabilities was similar to discrimination against minorities. Discrimination against members of either group had to be prohibited because in both cases it was based on unacceptable prejudice, generalization, and igorance.

A vast number of Americans have disabilities. According to the Census Bureau, one out of five noninstitutionalized residents aged 15 or over--37.3 million persons--has difficulty performing one or more basic physical activities.[1] For example, 18.1 million people, or more than 15 percent of the population had trouble walking up a flight of stairs without resting, and 5.2 million could not do so on their own. About 18.2 million people had trouble lifting or carrying something as heavy as a full bag of groceries, and 17.8 million of them could not do so. Of those who had trouble performing at least one function, 21.8 million were younger than 65 and 15.5 million were over 65.[2]

The significance of these data becomes clearer when one understands that the number of inividuals with disabilities who are gainfully employed, who are adequately housed, who are appropriately educated and trained, who can travel, and who are receiving government support, are shamefully low. According to the 1987 Harris survey, *Bringing Disabled Americans into the Mainstream*, people with disabilities are more than twice as likely to earn less than the federal poverty threshold. When these Americans pass the age of 65, they are three times as likely to be poor. Two-thirds of Americans with disabilities between 16 and 64 do not work, and only one in four have full time jobs, in spite of their willingness to work. Finally, approximately two-thirds of working age persons with disabilities do not receive Social Security or other public assistance income.[3]

If it were true that the people counted in these surveys were out of work because they were unable to work, or were in institutions because they were incapable of living in the community, or where poorly educated because they were incapable of learning, then the statistics listed above would be meaningless in a civil rights context. In fact, just the opposite is true. People who have adapted to their physical and mental disabilities face impenetrable societal barriers that prevented them from demonstrating their abilities. It is the denial of equal opportunity, not the absence of physical mobility or ability to work, that has led people with disabilities to outrank all other groups in poverty and unemployment statistics.

The fifteen and twelve years since the enactment of Section 504 and the Education of All Handicapped Children's Act respectively, have seen dramatic changes in the lives of people with disabilities. The government's enforcement of these laws, and the disabled persons' insistence on their rights to equal opportunity have resulted in federally assisted businesses, schools, local governments, and entertainment centers admitting people with disabilities in their midst. That each individual must be assessed according to his or her own abilities rather than a stereotyped preconception about the applicant's inability is finally becoming less of a novelty.

The recent progress that people with disabilities have made toward being accepted into society, toward broadening the concept of "community", and narrowing the definition of who "belongs" and who doesn't, has paralleled the integration of African-Americans into mainstream america. Just as the Civil Rights Acts of 1964 and 1968 were invaluable in moving America toward a more open society, so have been the civil rights laws passed on behalf of people with disabilities.

Yet, with the exception of the Fair Housing Amendments Act of 1988, no federal law imposes nondiscrimination requirements on the private sector, (those not receiving federal funds), to eliminate unjustifiable denial of equal opportunity to people with disabilities. In the 100th Congress, several Senate and House sponsors introduced the Americans with Disabilities Act of 1988 (ADA) to address that issue. Just as the public accommodations section of the Civil Rights Act of 1964 addressed the private sector's racially discriminatory practices, the ADA will address the segregatory effects of inaccessible health care systems, transportation systems, entertainment and recreation facilities, and private business enterprises on people with disabilities.

The ADA provides that individuals may not be denied the opportunity to participate in a program, job, or benefit, and may not be provided unequal services, solely because of their disability. It also establishes that it is discriminatory to impose (or fail to remove) architectural, transportation, and communication barriers, and to fail to make reasonable accommodations for people with disabilities. The bill also specifies that unequal actions, wholly unrelated to a disability, are not disrimin- atory, nor are actions which are the result of legitimate applications of qualifications standards necessary to perform the essential functions of a job.

The following chapters reflect the Reagan administration's uneven and generally unenthusiastic enforcement of the rights of people with disabilities in the Departments of Health and Human Services, Housing and Urban Development, Transportation, Education, in the Office of Federal Contract Compliance of the Department of Labor, and the Equal Employment Opportunity Commission. The new administration will not only have the opportunity--and the responsibility--to improve upon the Reagan administration record, but to lend its energy and support to the passage of the Americans with Disabilities Act. The combination of strong federal enforcement and new legislative protections, will perpetuate the changes that began in 1973 that have made the United States a richer and more democratic country in which to live.

The combination of strong federal enforcement and new legislative protections, will perpetuate the changes that began in 1973 that have made the United States a richer and more democratic country in which to live

CHAPTER XXV

CIVIL RIGHTS AND PERSONS WITH DISABILITIES: THE DEPARTMENT OF EDUCATION

by David Chavkin

I. Definition of Problem/ Evidence of Discrimination

More than 4 million children with disabilities are being educated in federally-assisted education programs.[1] These include more than 1.5 million children with specific learning disabilities; more than 1 million children with speech impairments; nearly 1 million children with mental retardation; more than 300,000 children with serious emotional disturbances; and more than 300,000 children with orthopedic impairments, with vision or hearing impairments, with other health impairments, or with multiple disabilities.

Little more than 10 years ago, most of these children would have been educated in segregated classes if at all. Many such children were completely excluded from the public schools. Other children with disabilities were warehoused in public school programs that provided little more than custodial care. Other children were misclassified as having such disabilities as retardation despite the absence of reliable test results.

This unfortunate state of affairs led to the passage of the Education for All Handicapped Children Act,[2] mandating that all handicapped children receive appropriate educational services in the least restrictive setting possible. Despite that mandate and other civil rights laws, discrimination has continued against many children and young adults with disabilities in programs funded or administered by the U.S. Department of Education.

The issue of discrimination against persons with disabilities in Department of Education programs occurs in various forms. First, some persons with disabilities are not provided an opportunity to participate in educational programs in the least restrictive setting possible. Second, persons with disabilities are sometimes not provided an opportunity to participate in educational programs designed to realize their potential. Third, some persons with disabilities are not provided an opportunity to participate in educational programs individualized to their needs.

During the period prior to the splitting of the Department of Health, Education and Welfare into two agencies, most of the focus of the Office for Civil Rights was on racial and sex discrimination in educational programs. Discrimination against persons with disabilities was left largely unaddressed.

Over the past eight years since the creation of the Department of Education, the Department should have taken vigorous steps to address these problems. Instead, in part because of the application of a laissez faire attitude towards civil rights enforcement on the basis of disability and in enforcement of educational entitlements, few issues have been tackled effectively and few questions have been answered definitively.

As a result of the abdication of its interpretive and enforcement responsibilities, most of those questions that have been answered have been answered in the first instance by the courts. Often this has occurred at the expense of persons with disabilities. Therefore much is left to be done and to be undone during the next Administration.

II. Statement of Governing Laws

A. Department of Education

The Department of Education was established in 1979, when the Department of Health and Human Services and the Department of Education were created from the prior Department of Health, Education and Welfare.[3] Functions were then divided between the two new agencies.

The Act also transferred certain responsibilities from the Director of the Office for Civil Rights to the Assistant Secretary for Civil Rights in the Department of Education. The Act transferred civil rights enforcement responsibilities based on the division of functions between the two agencies.

B. Major Programs

The Department of Education administers two major programs of particular concern to persons with disabilities. The first of these programs is the Education of the Handicapped Act (as amended by the Education for All Handicapped Children Act). The second of these programs is the Vocational Rehabilitation Act.

1. Education of the Handicapped Act

The Education of the Handicapped Act was amended and expanded in 1975 by Public Law 94-142.[4] The Act was designed to ensure that every handicapped child received a free, appropriate public education. Regulations implementing the Education of the Handicapped Act were promulgated in 1977[5] and are relatively unchanged since they were repromulgated in 1980 after the creation of the Department of Education.[6]

The phrase "free appropriate public education" is central to the statutory scheme. The term "free" means that services are to be provided at no cost to the child or family. The term "appropriate" means that the program is to be designed to meet the child's unique needs in a mainstream setting where possible. The term "public" means that services are to be provided in a public school program or at public expense. The term "education" includes specialized instruction and related services.

The heart of the special education process is the development of the individualized education program (IEP). A child is determined to need specialized instruction and/or related services in order to benefit from educational services as a result of an interdisciplinary screening process. Once screening and assessment are complete, an interdisciplinary team meets with the parents to determine the educational program and setting appropriate for the child. This educational program and setting are described in a document called the IEP. This IEP then embodies the agreement between the parents and school system over the services to be provided.

The special education program is administered within the Department of Education by the Office of Special Education Programs in the Office of Special Education and Rehabilitative Services (OSERS).[7] Three significant issues have plagued the administration of the special education program by OSERS.

One of these problems has been the passive role envisioned by OSERS in enforcing compliance. This role might be described as a "correspondence" role with state and local education agencies. A second problem has been the relationship between the Office for Civil Rights and OSERS in enforcing the requirements of the EHA and section 504 of the Rehabilitation Act.

A third major problem relates to the absence of regulatory guidance in many critical areas. Although the law used such value-laden phrases as "appropriate" and "least restrictive environment," these phrases were not self-defining. Congress failed to provide specific guidance on such concepts, largely because of the absence of a legislative consensus. When substantive interpretive regulations were not promulgated during the late 1970's, the Reagan Administration had a prime opportunity to fill the definitional gap and shape the law in a positive direction.

Unfortunately, the Reagan Administration failed to seize this opportunity. Instead, the responsibility for defining these phrases was left largely to the courts. Often the federal government was not even involved in the litigation that defined the major statutes within their administrative discretion. As a result, the 1980's was largely a period of chaotic developments in special education with national leadership dependent on U.S. Supreme Court intervention.

2. *Vocational Rehabilitation*

The Rehabilitation Act of 1973[8] provides grants to states for the provision of rehabilitation services to handicapped individuals to prepare them for and to permit them to participate in gainful employment. For the purpose of this Act, the term "handicapped individual" means a person with a physical or mental disability that constitutes or results in a substantial handicap to employment and who can reasonably be expected to benefit from vocational rehabilitation services.

Just as the special education program is based on the individualized education program (IEP), so the individualized written rehabilitation program (IWRP) is the heart of the vocational rehabilitation program. The IWRP sets forth the terms and conditions under which services are to be provided, the exact services to be provided through what resources, and the rights and responsibilities of the handicapped individual. These services may include a rehabilitation evaluation, counseling, guidance, referral and placement services, vocational and other training services, physical and mental restoration services, subsistence maintenance, interpreter and reader services, technological aids and devices, transportation, and other needed services. Changes in the goals of the IWRP are to be made only after consultation with the individual and upon a showing that the goal cannot be achieved.

3. *Miscellaneous Programs*

The Department of Education also administers a number of smaller grant programs directly addressing the needs of persons with disabilities. These programs include Centers for Independent Living (to encourage independence and independent living for persons with disabilities);[9] Training of Interpreters for Deaf Individuals[10] (to expand the availability of qualified interpreters for persons with severe hearing impairments); and

Handicapped Research[11] (to assist in the conduct of research and in the development of technology relevant to persons with disabilities).

C. Civil Rights Statutes

The major civil rights statutes affecting persons with disabilities enforced by the Department of Education are sections 501 and 504 of the Rehabilitation Act of 1973 and the Education of the Handicapped Act. Although the EHA is properly thought of as a substantive grant-in-aid statute, its purpose and scope are civil rights in nature. In fact, this civil rights nature is emphasized in the discussion of discrimination in Appendix A to Subpart D (Preschool, Elementary, and Secondary Education) of the Department's section 504 regulations. This discussion repeatedly emphasizes that compliance with the EHA "process" requirements will satisfy most of the section 504 civil rights concerns of the Department.

In addition to these provisions, there are some narrowly targeted provisions addressing specialized problems in specific programs administered by the Department.

1. *Rehabilitation Act of 1973*

Section 501 of the Rehabilitation Act[12] requires federal agencies to adopt affirmative action plans for the hiring, placement, and advancement in employment of persons with disabilities. The internal hiring practices of the Department are subject to the requirements of this section.

Section 504 of the Rehabilitation Act[13] prohibits discrimination on the basis of handicap by recipients of federal financial assistance against otherwise qualified handicapped persons.

Section 504 was originally enacted in 1973.[14] 1978 amendments referred to in the text of the statute significantly expanded the scope of the statute by covering for the first time programs or activities conducted by executive agencies. Prior to this amendment, activities of the executive agencies were not subject to the same anti-discrimination requirements applied to recipients of federal assistance.

Pursuant to Executive Order No. 11914,[15] the Department of Health, Education and Welfare was given lead responsibility for developing government-wide Section 504 regulations. In 1980, the Department of Justice was reassigned responsibility for implementation and coordination by Executive Order No. 12250.[16]

The regulations implementing section 504 were first promulgated in 1977[17] and have existed in relatively unchanged form since that date. After the creation of the new Department of Education, education-specific section 504 regulations were promulgated in 1980.[18]

2. *Vocational Education*

Vocational education services may be provided to students with disabilities as well as to temporarily able-bodied students. Federal law establishes criteria for the provision of vocational education services to children with disabilities and to disadvantaged children.[19] It also requires that equal access be provided to children with disabilities in recruitment, enrollment, and placement activities in vocational education services and activities and in the full range of vocational programs available to nonhandicapped and nondisadvantaged children, including occupationally specific courses of study, cooperative education, and apprenticeship programs.

III. Interpreting the Laws

Probably the major change in the law attempted by the Reagan Administration was an effort to turn the entitlement nature of the Education of the Handicapped Act into a block grant program with minimal federal requirements. This effort was abandoned after initial attempts to "block grant" the special education programs were unsuccessful. The other major battles to interpret the civil rights laws took place in the courts.

A. Appropriateness

Although the Education of the Handicapped Act required education agencies to provide handicapped children with an "appropriate" education, the Act did not define this term. In the absence of agency action to interpret this term by regulation, the task was left to the courts.

The first case to reach the Supreme Court under the Education of the Handicapped Act was *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*.[20] The plaintiff in this case was a child with a severe hearing impairment that left her with minimal residual hearing. Although she was described as an excellent lipreader, the evidence demonstrated that this permitted her to receive only about half of all oral communications. For this reason, her parents requested that she be provided with a qualified sign-language interpreter in all of her academic classes.

Although all of the parties agreed that such an interpreter would be helpful to the plaintiff, the school authorities refused to provide this service and argued that they were not required to under federal law. The case squarely presented the issue whether local education agencies were required to provide services needed to permit a child to reach his or her potential or simply enough services to permit the child to progress academically.

After the federal district court and Court of Appeals supported the parents' position, the Supreme Court reversed. The Court ruled that although a school system was required to demonstrate something more than the mere fact that the child advanced from grade to grade, services to achieve maximum potential were not required. Instead, the school system was simply obligated to demonstrate that "the education to which access is provided be sufficient to confer *some* [emphasis added] educational benefit upon the handicapped child."

The United States as *amicus curiae* took a position in support of the parents and argued that the lower court decisions should be affirmed. Although the position expressed, that children with disabilities are "entitled to equal access to the existing educational environment," was somewhat more restrictive than the position urged by the parents and their other supporters, this was the first and last time, to date, that the government opposed school systems in a special education case before the Supreme Court.

Although the position adopted by the Supreme Court in *Rowley* generally imposes less significant burdens on educational agencies, it sometimes imposes greater burdens than would be imposed under a "maximum potential" standard. For most children with disabilities, a "maximum potential" standard requires educational agencies to provide more intensive services since some educational benefit is not enough; the agency would have to demonstrate that the child's full potential is being achieved.

However, for children with severe multiple handicaps, the "some educational benefit" standard may actually be more difficult for the educational agency to meet. In such cases, the agency must point to objective evidence to demonstrate that educational benefit is being realized. It cannot hide behind an argument that the child has achieved his or her potential and that additional educational benefit cannot be achieved.

What is required is some rethinking of the standard that should be used to evaluate appropriateness for all children post-*Rowley*. In light of the *Rowley* decision, it is too late to address this problem by administrative rulemaking. The Supreme Court's decision creates too great a barrier for reinterpretation of congressional intent. Legislation would be necessary to impose a higher educational standard.

B. Unilateral Placement

Parents frequently disagree with education agencies over the appropriate classification of their children, over the appropriate programming to be provided, and over the appropriate site for the provision of educational services. An extensive appeals system is mandated by the Education of the Handicapped Act to provide a non-judicial forum for resolution of these disputes.

Ordinarily the Education of the Handicapped Act requires children to remain in their last approved educational placement until appeals are exhausted. This is not an issue for most low-income families since they cannot afford to place their children with disabilities in private placements that may cost upwards of $50,000 per year. However, for middle- and upper-class families, the potential for unilateral placement exists.

In the case of *Burlington School Comm. v. Mass. Dept. of Educ.*,[21] the Supreme Court considered whether such a unilateral placement by parents waives the parents' rights to seek reimbursement from the school system. The Supreme Court concluded that unilateral placement did not waive reimbursement rights. The child in that case had a severe learning disorder characterized by perceptual difficulties. In addition, the child was determined to have a secondary emotional disorder. After the school system declared that the child's primary disability was emotional and refused to provide a program consistent with the medical evaluation obtained by the parents, the parents placed the child in a state-approved private school for special education.

After an administrative decision favorable to the parents ordering reimbursement of the private school placement, the school system appealed to the federal district court. The district court conducted a new trial and reversed the administrative hearing decision. The Court of Appeals for the First Circuit reversed the district court and remanded the case. The school system filed a petition for certiorari to the Supreme Court.

The Supreme Court concluded that unilateral placement by the parents did not constitute a waiver of reimbursement if the parents ultimately prevailed in the appeals process. The Supreme Court emphasized that to interpret the law otherwise would force parents "to leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement." Thus, although poor children with disabilities would be relegated to what might turn out to be an inappropriate educational placement, wealthy children would at least have the chance for something better. The federal government did not formally participate in this case before the Supreme Court.

C. Expulsion and Suspension

One of the provisions relied on by the school system in the *Burlington School Committee* case was EHA's "maintenance of placement" provision. This provision generally requires children to remain in their last approved placement while appeals are exhausted. The Supreme Court noted that one of the purposes of the maintenance of placement provision was "to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings."

In the *Burlington School Committee* case, a school system attempted unsuccessfully to use the "maintenance of placement" provision as a shield to defeat the parents who had failed to maintain their child's placement. Conversely, in *Honig v. Doe*,[22] parents attempted to use the "maintenance of placement provision as a sword to defeat the unilateral action by the school system to expel their child.

The children involved in the case were identified as having severe emotional disturbances. Both children had been expelled from the educational programs after incidents of disruptive behavior. The administrative actions culminating in the Supreme Court case were then commenced.

The U.S. government argued initially that the case was moot, a position opposed by both the petitioners and respondents. This position was also summarily rejected by the Supreme Court.

Turning to the merits of the case, the Court found that the language of the "maintenance of placement" provision was unequivocal and that the omission of any "extraordinary circumstances" exception was "intentional." The Supreme Court concluded that it was "not at liberty to engraft onto the statute an exception Congress chose not to create."

Ironically, the Court then proceeded to engraft two exceptions not contained in the statute. First, the Court adopted the government's position that suspensions of ten days or less did not constitute a change in placement. Second, the Court authorized school officials to bypass the administrative appeals process and pursue actions for injunctive relief in the federal courts to modify the child's current educational placement.

In doing so, however, the Court rejected the government position that federal courts could not enjoin local school officials from indefinitely suspending students pending completion of expulsion proceedings. The Court also rejected the related government position that the federal court had "indulged an improper presumption of irreparable harm" to the student.

D. Section 504 and Attorney's Fees

The Education of the Handicapped Act and section 504 of the Rehabilitation Act of 1973 have substantial areas of overlap. The Education of the Handicapped Act requires every school system to provide every handicapped child with a free, appropriate public education. Section 504 prohibits discrimination on the basis of handicap and has been interpreted administratively to require every school system to provide every handicapped child with educational services equally effective to those provided to non-handicapped children. One key difference is that prior to 1986 only section 504 authorized an award of attorney's fees to parents who prevailed against a school system.

In *Smith v. Robinson*,[23] the Supreme Court considered whether parents could be awarded attorney's fees under the Rehabilitation Act for fees incurred in special education disputes. A majority of the Court concluded that fees could not be awarded.[24]

The child in the *Smith* case had cerebral palsy and a variety of physical and emotional disabilities. The parents were forced to initiate litigation when the local school system unilaterally terminated funding for the child's hospital-based day program.

After concluding that the Education of the Handicapped Act was the exclusive vehicle for presenting constitutional challenges to actions by the school system, the Supreme Court turned to the question of whether attorney's fees could be based on section 505 of the Rehabilitation Act in light of a substantial claim for relief under section 504 of that Act. The Court then ruled that where section 504 "adds nothing to the substantive rights of a handicapped child, we cannot believe that Congress intended to have the careful balance struck in the EHA upset by reliance on sec. 504 for otherwise unavailable damages or for an award of attorney's fees." The federal government did not formally participate in this case before the Supreme Court.

The effect of this decision was effectively overturned by congressional action in 1986. The Handicapped Children's Protection Act[25] added an attorney's fees provision to the Education of the Handicapped Act. Courts can now award reasonable attorney's fees when parents or guardians prevail in "any action or proceeding brought under" the Education of the Handicapped Act.

E. Related Services

The Education of the Handicapped Act requires the provision of specialized instruction and related services as appropriate to the needs of the child. While the provision of related services in sufficient quantity to meet a child's needs has been an ongoing problem, the determination of those services included within the definition of "related services" has also been a problem.

Consensus exists that such services as counseling and physical therapy come within the definition of "related services" and must be provided if needed by the child. The major definitional dispute has arisen with regard to those other "health" services that need not be provided by a doctor under state medical practice laws. While parents and advocates have contended that these services are "related" services, some education agencies have argued that such services are medical services that need not be provided under federal law.

This issue presents one of the most symbolic examples of Reagan Administration inaction on behalf of children with disabilities. The regulatory history of this issue is especially instructive. On January 19, 1981, the outgoing Carter Administration officials in the Department of Education published a notice of interpretation in the Federal Register.[26] This notice interpreted the Education of the Handicapped Act as requiring the provision of clean intermittent catheterization by school personnel if required to permit a handicapped child to benefit from special education services. This interpretation was to take effect 45 days after publication.

Although the procedure of clean intermittent catheterization (CIC) is a relatively simple one that can be performed in a few minutes by a layperson with less than an hour's training, many school districts had refused to include CIC within the individualized education programs (IEP) for children. This issue also had significance beyond the issue of CIC because of the implications for children requiring other non-medical health services.

On February 17, 1981, the Reagan Administration postponed the effective date of this policy statement until March 30, 1981, along with numerous other Carter Administration actions.[27] On March 27, 1981, the effective date was postponed again, this time until May 10, 1981.[28] On May 8, 1981, the effective date was postponed again, this time indefinitely "until further notice".[29]

More than one child could not wait until that "further notice." In the case of *Irving Independent School Dist. v. Tatro*,[30] a child with spina bifida had orthopedic and speech impairments and a neurogenic bladder. This latter condition prevented her from emptying her bladder voluntarily. Consequently, she had to be catheterized every three or four hours to avoid injury to her kidneys.

The school district refused to provide the CIC services even though they could be administered by a nurse under state law. Administrative remedies were then pursued because the failure to provide CIC as a "related service" meant that the child would be excluded from school until she was old enough to perform the catheterization herself.

The Supreme Court held that CIC services were included within the definition of "related services" as a "supportive service . . . required to assist a handicapped child to benefit from special education." The Court also accepted the decision of the Court of Appeals that provision of CIC is not a "medical service" which a school is required to provide only for purposes of diagnosis or evaluation under the Education of the Handicapped Act. The federal government did not even appear in this case.

F. Targets of Vocational Rehabilitation

An ongoing problem for persons with disabilities under the Rehabilitation Act has been the potential for discrimination against those with severe disabilities. In rehabilitation programs, success is measured by the numbers of persons who succeed in making the transition from rehabilitation services to competitive employment. Since funds are limited under the Act, measures of success will be maximized by "creaming" persons with mild disabilities who can most easily be placed in competitive employment.

This potential discrimination against persons with severe disabilities is specifically addressed in section 101(a) (5) (A) which requires state plans to describe the method "to be used to expand and improve services to handicapped individuals with the most severe handicaps," and that if funding is insufficient to provide services to all eligible handicapped individuals who apply for services that priorities be established "on the basis of serving first those individuals with the most severe handicaps."

Unfortunately, OSERS has failed to aggressively enforce these requirements. No effective monitoring has occurred. As a result, rehabilitation services appear to be received in many states disproportionately by those least in need.

G. Discrimination in Vocational Education

Despite the civil rights protections embodied in federal law, vocational education programs have continued to discriminate against children with disabilities. Materials for such vocational programs as air conditioning maintenance are frequently written in a way that makes them inaccessible to persons with learning disabilities. Meaningful vocational programs are often based only at schools other than those that serve children with more significant handicaps. Educators involved in vocational education programs often believe that they have no obligation to make reasonable accommodations to permit participation by children with disabilities in their classes.

This area of concern is ripe for compliance monitoring. Surveys to identify the classes of persons served by vocational education programs, the nature of placements provided to different classes of persons, and the sites for programs would go far towards identifying problem areas in the discriminatory provision of services. Almost nothing has been done on this issue at a national level.

IV. Failures in Enforcement

The problems outlined above do not represent the only problems with enforcement, but they are symptomatic of the pervasive failures that have occurred. Most of these deficiencies can be laid at the feet of an Office of Special Education and Rehabilitative Services that seemingly is more concerned with maintaining good relations with state departments of education and vocational rehabilitation than in preserving the rights of the children and adults with disabilities within their charge.

OSERS has never been properly staffed for conducting large numbers of onsite investigations of parent complaints. It has viewed its role as providing general policy guidance while channelling funding. Federal funding, however, plays only a small role in supporting education, an area traditionally reserved to the discretion of states and localities.

The lack of investigative efforts and personnel might not be a problem if OSERS were not the enforcement agency of first resort. Since section 504 has been interpreted by the Supreme Court as secondary to the EHA, the role of OCR is secondary to OSERS. Thus, OSERS, in theory, has the first opportunity to review any special education complaints. Regardless of the outcome of the OSERS investigation, the role of OCR is ambiguous.

OSERS does not bear sole responsibility for these failures. The Office for Civil Rights, which at one time contributed to a government-wide commitment to civil rights, has shrunk from its prior role. Section 504 issues in such educational programs as vocational education have not disappeared, but OCR is not addressing them. While they may be more subtle in nature, that simply means that OCR needs to develop a wiser and more effective approach to enforcement.

Part of this situation is attributable to the uncertainty created by the decision of the United States Supreme Court in *Smith v. Robinson*. After that decision, holding that section 504 could not be utilized in most special education cases, the role of the Office for Civil Rights became even less clear. But even in areas where OCR jurisdiction is not in dispute, OCR has failed to act aggressively.

The Department of Education failed to respond in a timely manner to a Freedom of Information Act request that was filed in conjunction with this chapter. The responsible congressional committees have also not conducted the level of oversight review needed to really monitor performance. It is therefore not presently possible to evaluate the extent and quality of compliance reviews or complaint investigations. However, the available anecdotal information suggests that compliance reviews have been largely nonexistent and that complaint investigations have been completely inadequate. As a result, enforcement has been left to the administrative hearing process and to the courts.

V. Emerging Issues and Challenges

A. Making Mainstreaming a Reality

One of the emerging issues and challenges is the need to directly confront the consensus model in this country with regard to education of children with disabilities. Although special education programs are significantly better today than they were 20 years ago, it does not appear that this nation is truly committed to educating children with severe disabilities alongside children who are not so identified.

Many special education programs continue to adhere to a token mainstreaming policy. Under such a policy, children with significant disabilities (and, in the eye of the school system, this may include children with emotional and specific learning disabilities) are removed from "regular" classes for all academic subjects and are "mainstreamed" only for such activities as lunch, physical education, music, and art.

Is such a model an improvement over complete segregation of children with disabilities? The answer obviously is yes. Is such a model an implementation of true mainstreaming? The answer just as obviously is no.

A meaningful solution to this problem would require significant changes in both teacher-student staffing ratios and training. A teacher who must educate substantially fewer children can more easily address what might be otherwise characterized as "disruptive" behavior. Similarly, a teacher with a reduced class size can more easily develop special materials to meet the learning problems of a student with special needs. A teacher with proper training in special education can utilize his or her extra time more effectively to develop specialized education plans.

B. Increasing the Availability of Related Services

A closely related problem is the availability of related services. Although many states have specific teacher-student ratios to define various levels of special education placement, these standards do not apply as effectively to the provision of related services. When individualized education programs are developed for students, they may be developed in light of the services available instead of the services needed. For example, because of staff shortages, there is often a tendency to reduce the identified need for physical therapy services, speech therapy services, and counseling services from the levels needed by the child as identified through assessments. Many advocates and educators who regularly participate in IEP development meetings describe this phenomenon as a common one. Rather than order specified services in an IEP that the school finds difficult to deliver because of inadequate resources, IEP participants simply scale down their needs assessments. This is a difficult problem to identify even through surveys, but it is a critical problem that must be addressed.

C. Services in Institutions

Special education services in institutions are a continuing problem. For example, when youths are committed by courts to juvenile detention facilities, they often do not receive the special education services to which they are entitled under the law. Surveys indicate that these children are disproportionately more likely to have emotional and learning disabilities. Although both the EHA and section 504 require the provision of a free, appropriate public education to these children, educational services in institutions are frequently subject to the same limitations on funding that lead to inadequate physical plants and inadequate rehabilitation services.

D. Misclassification of Children

Discrimination against children with disabilities is not the only type of civil rights special education issue that must be addressed in the years ahead. For example, it has been known for some time that minority children are disproportionately overrepresented in certain special education programs. While minority children are more likely to have been low-birth weight babies and therefore are at greater risk for disabilities, the representation appears to go beyond predicted norms. This is especially true in some school system programs for children classified as learning disabled or as "educable mentally retarded."

At least since 1979, the Department has had survey data documenting this as a potential issue. However, no meaningful action has been taken to identify the scope or causes of this problem. Are minority children being dumped in special education programs by certain teachers to avoid having to deal with them? Are other teachers placing minority children in special education programs as a way, albeit misguided, of getting them additional attention?

The Department does not know because neither OCR nor OSERS has taken on this issue. In the meantime, people continue to conjecture regarding the scope of the problem, its causes, and its solutions. Whether this issue is addressed as a title VI issue (discrimination on the basis of race, color, or national origin against minority persons) or as a section 504 issue (discrimination in the least restrictive placement against persons regarded as handicapped), this issue should be addressed on a priority basis.

E. Pending Regulatory Changes

On October 24, 1988, the Department of Education published its semi-annual regulatory agenda. The following initiatives affecting the civil rights of persons with disabilities were highlighted in that agenda:

1. In December 1988, the Department proposes to publish a notice of proposed rulemaking regarding accessibility standards to monitor nondiscrimination on the basis of handicap in federally assisted programs.

2. On April 1, 1988, the Department published a notice of proposed rulemaking regarding nondiscrimination on the basis of handicap in federally conducted programs.[31] No further action has been taken at this point.

3. In November 1988, the Department proposes to publish a notice of proposed rulemaking regarding deregulation of vocational rehabilitation programs.

4. In March 1989, the Department proposes to publish a notice of proposed rulemaking regarding deregulation of the general regulations governing the Rehabilitation Services Administration.

5. On March 14, 1988, the Department published a notice of proposed rulemaking regarding assistance to states for education of handicapped children.[32] No further action has been taken at this point.

6. On November 18, 1987, the Department published a notice of proposed rulemaking regarding preschool grants for handicapped children.[33] No further action has been taken at this point.

7. On November 18, 1987, the Department published a notice of proposed rulemaking regarding early intervention programs for children with disabilities.[34] No further action has been taken at this point.

8. On May 3, 1988, the Department published a notice of proposed rulemaking regarding vocational rehabilitation services to individuals with severe handicaps.[35] No further action has been taken at this point.

VI. Recommendations

A. Enforcement Responsibilities

One of the first priorities of a new Administration should be a decision as to the relationship between the Office for Civil Rights of the Department of Education and the Office of Special Education and Rehabilitative Services. Traditionally OSERS has viewed itself as a "correspondence" agency, writing letters to state educational agencies and getting back responses from those agencies. It is a policy development and funding agency; it has not been an enforcement agency.

Not that OSERS could never be an enforcement agency, but for a variety of reasons, it may be desirable to establish a memorandum of agreement between OCR and OSERS that OCR will perform enforcement responsibilities.

Such an agreement could be similar to the one executed between the Office for Civil Rights of the Department of Health and Human Services and the Health Resources and Services Administration (HRSA) of that Department. Under that agreement, OCR enforces the Hill-Burton community service assurance, although HRSA was the funding agency and policy development agency for that program. The memorandum of agreement simply recognizes that section 504 enforcement is closely related to Hill-Burton enforcement and that it makes little sense to have two enforcement agencies stepping on each other's toes.

B. Policy Development

Since the Supreme Court's special education cases of the 1980's, there is a great need for policy development at the administrative level and, potentially, in legislative action. For example, the Supreme Court's formulation of the "appropriateness" standard in *Rowley* could be revisited so that the EHA would impose a greater burden on education agencies. Similarly, the amount and quality of mainstreaming that has occurred should be examined closely to determine whether nearly all children are being served appropriately in integrated classes with appropriate staffing resources. Little has been done to address these issues over the past eight years in a thoughtful, systematic, and coherent fashion.

C. Funding

It is difficult to separate the issue of enforcement from the issue of funding. To the extent that more funding becomes available, even recalcitrant agencies become more willing to support expanded programs for persons with disabilities. Continuing inadequate funding for these programs since 1980 has not only frustrated growth and improvement, but has reinforced intransigence on the helpful part of many jurisdictions. Increased funding will necessarily be a part of any equation for success in addressing civil rights concerns in programs under the jurisdiction of the Department of Education.

CHAPTER XXVI

CIVIL RIGHTS AND PERSONS WITH DISABILITIES: THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

by David Chavkin

I. Definition of Problem/ Evidence of Discrimination

Although estimates of the numbers of persons with disabilities vary widely from approximately 20 million to 50 million persons, the most commonly accepted estimate is that there are 36 million persons with disabilities in the United States.[1] Because of factors associated with their disabilities, discrimination in employment, inadequacies of public transportation and other problems, a disproportionately large percentage of these 36 million persons are low-income.[2] As a result, they are also disproportionately dependent on federally funded health and human service programs.

Prior to the splitting of the Department of Health, Education and Welfare into two agencies in 1979, its Office for Civil Rights focused primarily on discrimination in educational programs. There were several reasons for this focus. Education was one of the most visible programs beset by *de jure* discrimination. Education was a key target of such civil rights organizations as the NAACP Legal Defense Fund. Litigation like the *Adams v. Richardson* case[3] resulted in a commitment of OCR resources to education cases in lieu of other areas.

With the creation of the Department of Education, nearly all educational programs were transferred to it and placed outside the jurisdiction of the Office for Civil Rights of the new Department of Health and Human Services (HHS). That left the new HHS Office the task of rethinking the area of civil rights enforcement in health and human services programs. That rethinking has not been accomplished to date. The past eight years largely reflect a period of suspended animation in this effort.

Although instances of intentional discrimination are still present in programs funded or administered by the Department of Health and Human Services, the major problems relate to unintended discriminatory impact in these programs. Efforts to eliminate discriminatory impact on persons with disabilities are based upon a recognition that it is ordinarily not enough to simply not affirmatively deny access to services for persons with disabilities. Some affirmative steps must be taken to make services accessible.

Thus, in foster care services, special efforts are necessary to recruit and train foster parents to provide specialized care for children with disabilities. In the absence of such special steps, the only available placements for such children will be in state institutions. Such unnecessary and inappropriate institutionalization is still far too often the placement of choice in many states.

Similarly, in the Medicaid program, it is not enough to provide a Medicaid card for children and adults with disabilities. If medical providers have physical barriers to surmount, recipients with orthopedic impairments will be denied access. If medical providers do not have telecommunications devices for the deaf and cannot communicate in sign language, recipients with hearing impairments will be denied access. Far too many medical providers are still inaccessible for many recipients with disabilities.

Discrimination continues to occur in other health and human service programs. Many welfare and social security offices do not readily provide home visits, with the result that eligibility is often delayed or denied for home-bound recipients. Medicare programs sometimes use overly restrictive criteria for home services and nursing home care to determine eligibility, causing funding for persons with disabilities to be disproportionately restricted.

The civil rights history of the Reagan years in health and human services programs has largely been one of neglect and inattention rather than affirmative harm. Little has been done either way to think through the emerging civil rights issues in health and human services programs. That will be a key task of the new administration.

II. Statement of Governing Laws

A. Department of Health and Human Services

The Department of Health and Human Services was established in 1979 with the passage of Public Law 96-88. This Act created the Department of Health and Human Services and the Department of Education from the prior Department of Health, Education and Welfare. Functions were then divided among the two new agencies.

That Act also transferred certain responsibilities of the Director of the Office for Civil Rights in the Department of Health, Education and Welfare to the new Assistant Secretary for Civil Rights in the Department of Education. The Act transferred civil rights enforcement responsibilities based on the division of functions between the two agencies.

B. Major Programs

The major programs of concern to persons with disabilities can be identified most easily based on the programmatic responsibilities of the principal operating components (POCs) of the Department. These POCs include the Office for Civil Rights (OCR), the Assistant Secretary for Health (ASH), the Assistant Secretary for Planning and Evaluation (ASPE), the Public Health Service (PHS), the Health Care Financing Administration (HCFA), the Social Security Administration (SSA), the Family Support Administration (FSA), and the Office of Human Development Services (OHDS).

With a few exceptions, most of the programs administered by these agencies are disability-neutral (i.e., the programs are not specifically directed at persons with disabilities). However, even in these programs, apparently neutral eligibility and service requirements may have special impact on the civil rights of persons with disabilities.

1. Health Care Financing Administration (HCFA)

HCFA administers two major programs of special significance to persons with disabilities. The first of these programs is the Medicare program. The second is the Medicaid program.

The Medicare program[4] is a social insurance program providing reimbursement for medical care services received by program beneficiaries. Two major classes of persons are covered under the program. The first class includes those persons 65 years of age or over who receive old age or retirement benefits. The second class includes those persons under the age of 65 who have received Social Security disability insurance benefits for at least 24 months.

The Medicare program provides services in two parts. Part A includes reimbursement for inpatient hospital services, skilled nursing care, and home health care. Part B includes reimbursement for physician services and other outpatient services. Recent legislation has provided some protection against certain catastrophic medical expenses. Premiums, coinsurance, and deductible requirements are applicable to these two parts.

The Medicaid program[5] is a social welfare program providing reimbursement for medical care services received by program beneficiaries. Three major classes of persons are covered under the program. The first class includes those mandatory categorically needy persons who receive Supplemental Security Income benefits on the basis of their disability or who are over 65. The second class includes those optional categorically needy persons who would qualify for Supplemental Security Income benefits but for excess income and who need nursing home care. The third class includes those medically needy persons who would qualify for Supplemental Security Income benefits but for excess income and who have such high medical expenses that their available income is reduced below eligibility limits.

Once eligible for Medicaid, reimbursement for services varies significantly from state to state and within states, depending on the eligibility class into which the beneficiary falls. Most states provide reimbursement for a mix of inpatient and outpatient hospital services, physician services, prescribed drugs, nursing home care, and other services.

Persons with disabilities are disproportionately low-income because of discrimination in employment and other factors. Persons with disabilities are also discriminated against in the issuance of health insurance policies. As a result of these two factors, persons with disabilities are also disproportionately dependent on the Medicaid and Medicare programs for access to health care. Because of this dependence, they are also disproportionately adversely affected by barriers to access under these programs.

Over the past eight years, initiatives to restrict eligibility and refusals to implement congressionally-mandated expansions have had a disproportionate adverse effect on children and adults with disabilities. Administration of such restrictive criteria as the custodial care exclusion[6] (which is used to deny reimbursement for nursing home and other care) under Medicare and the amount, duration and scope requirement[7] (which is used to restrict the scope of services available to recipients) under Medicaid have similarly had a disproportionate adverse effect on persons with disabilities.

In addition, such reimbursement practices as diagnosis-related groups for hospitals and per diem reimbursement for nursing homes encourage "creaming" of healthier patients and therefore have had a disproportionate adverse effect on persons with disabilities.[8] Finally, administrative practices that discourage provider participation and minimize beneficiary eligibility have a disproportionate adverse effect on persons with disabilities by restricting access to needed services.

2. Social Security Administration (SSA)

The Social Security Administration administers the largest financial assistance programs in the Department of Health and Human Services. These programs are the Old Age, Survivor's, and Disability Insurance (OASDI) social insurance programs[9] and the Supplemental Security Income (SSI) social welfare programs.[10]

The Old Age program provides financial assistance to workers over 65 (or over 62) and to their dependents. The Survivor's program provides financial assistance to the dependents of deceased workers. The Disability program provides financial assistance to disabled workers and to their dependents. The Supplemental Security Income program provides financial assistance to low-income aged, blind and disabled persons.

Two major differences distinguish the OASDI and SSI programs. The OASDI programs provide assistance only to those persons with sufficient earnings credits, but generally do not contain means tests. By contrast, the SSI programs provide assistance to persons regardless of their earnings history, but limit eligibility to only those persons who meet strict means tests.

A major Reagan-administration initiative was directed at reducing the number of persons with mental impairments receiving Social Security Disability Insurance and SSI benefits through continuing disability investigations. Although Congress must bear partial responsibility for the extensive human misery that was caused, "the human dimensions of the crisis - the unnecessary suffering, anxiety, and turmoil" documented in dozens of congressional hearings were largely the product of Administration directives.[11] Hundreds of thousands of mentally disabled beneficiaries were unlawfully terminated, many never to be heard from again. Such terminations took place despite the fact that courts across the country consistently enjoined the unlawful agency actions.

The administration of the continuing disability review process in the early 1980's was unusually harsh, but disability determinations have historically been made in an overly restrictive manner. Clear evidence of this administrative bias is provided by the 50 percent reversal rate for those cases reaching an administrative law judge. The effect of restrictive eligibility determinations is to deny financial assistance required by persons with disabilities for food, clothing, and shelter. Also, because Medicaid eligibility is linked to SSI eligibility in most states, disqualification from SSI has the secondary effect of depriving many eligible persons with disabilities of access to needed medical care.

Another ongoing problem has been the accessibility of Social Security Administration programs to persons with disabilities. Many offices have now installed telecommunications devices for the deaf (TDDs) to communicate with persons with hearing impairments, but these devices are not always staffed by persons who know how to operate them. And SSA has failed to allocate adequate resources to permit home eligibility interviews for persons unable to come into Social Security offices.

3. Office of Human Development Services (OHDS)

The Office of Human Development Services (OHDS) primarily administers block grant programs to states to provide services for targeted populations. At least one of these programs is directed at persons with disabilities.

Under the Developmental Disabilities Assistance and Bill of Rights Act,[12] OHDS provides federal funds to state planning councils, to protection and advocacy agencies, and to university-affiliated programs in order to expand services for persons with developmental disabilities. This program lawfully discriminates between classes of persons with disabilities in that it establishes programs only for certain targeted classes of beneficiaries.

Some persons with disabilities (those with an age of onset before age 22) may qualify for services while other persons with the same disabilities (but with an age of onset on or after age 22) will not qualify for services even if they have a greater need. Although this discrimination is authorized by federal law and is therefore not violative of section 504 of the Rehabilitation Act of 1973, one impact of this program is to fragment the service delivery system.

The problem of discrimination between classes of persons with disabilities can also extend into prohibited areas. Services at the state level are often apportioned by planning councils controlled by persons representing the various constituent organizations. Depending on the relative strengths of this representation, services may favor certain groups at the expense of others. Since equally effective services are not being provided to all groups, instances of discriminatory treatment may occur.

Similar problems exist in other OHDS programs. Administration on Aging programs may favor mentally alert, frail elderly persons at the expense of elderly persons with mental disabilities. These programs sometimes fund services that can only be used by persons without mental impairments. Some Head Start programs exclude children with certain disabilities, further disadvantaging their educational achievement.

Many foster care program tend to favor children without disabilities over children with disabilities. Pursuant to federal law, funds are made available to meet the needs of a child who has been removed from the home of a parent or relative as a result of a judicial determination that continuation in that home would be contrary to the welfare of that child.[13] Such children are generally placed under the jurisdiction of the state's juvenile court system under the supervision of a local department of social services. Such children generally receive medical assistance benefits and social services.

Children with disabilities are frequently part of the state foster care system. Neglect and abuse by some parents may cause specific disabling conditions in cases such as drug abuse, alcoholism, or physical or emotional abuse. Likewise, the existence of the disabling conditions may be one of the reasons the parents or relatives are no longer able to provide appropriate care and services for the children.

Unfortunately, foster children with disabilities do not always receive equally effective services. They may receive services in more restrictive institutional settings as a result of the refusal by the state and local welfare agencies to develop appropriate specialized foster care settings and to fund these settings adequately. In addition, these agencies may attempt to avoid their responsibility for these children by abdicating their responsibility to the state's health agency. In either case, significant civil rights issues are raised.

4. *Public Health Service*

The Public Health Service administers a variety of grant and loan programs. One of the PHS programs of special concern to persons with disabilities is the Maternal and Child Health Block Grant.[14]

The Maternal and Child Health Block Grant traces its origins to the enactment in 1935 of the Crippled Children's Program (title V of the original Social Security Act). Initially, the program focused almost exclusively on treating children with orthopedic impairments resulting from polio. Later, the program began covering other chronic disabilities, particularly chronic heart and pulmonary ailments.

In the early 1960's, Congress began to add new services, including projects of maternity and infant care and children and youth projects. In 1976, when Congress enacted the SSI disabled children's program, Crippled Children's Program agencies generally assumed jurisdiction over this program.

In 1981, the Title V program was modified as part of the Reagan Administration initiatives to establish block grants. Six programs, in addition to the maternal and child health and crippled children's services programs, were collapsed into the new title V block grant.

The new block grant program initiated two other significant changes. First, a nondiscrimination provision was added to the statute, prohibiting discrimination on the basis of handicap as well as on other grounds. Second, the statutory definition of "crippled children" was repealed, thereby eliminating the longstanding restriction of the program to coverage of children with "organic diseases and defects."

Despite these changes, most state programs continue to exclude from coverage children with such major childhood disabilities as diabetes, cancer, asthma, sickle cell anemia, mental illness, and other conditions. The scope of conditions covered varies from state to state and appears to be far more a reflection of the interests and skills of people who administer the program than a rational response to objective data regarding the prevalence of various childhood disabilities within the community and the available resources for dealing with those disabilities.

In light of the legislative changes linking eligibility to those children with "special health care needs," it is difficult to imagine how it could be argued that children with excluded disabilities are not "otherwise qualified" under section 504. The present discrimination therefore appears to constitute a clear, albeit unaddressed, violation of section 504. The coverage of such chronic illnesses as cystic fibrosis (prevalent among white children) at the expense of such chronic illnesses as sickle cell anemia (prevalent among black children) may also raise significant questions under title VI of the Civil Rights Act of 1964.

C. Civil Rights Statutes

The major civil rights statutes affecting persons with disabilities enforced by the Department of Health and Human Services are sections 501 and 504 of the Rehabilitation Act of 1973 and the Hill-Burton Act. These sections of the Rehabilitation Act are expressly directed at protecting the civil rights of persons with disabilities. The Hill-Burton Act's community service assurance has special implications for persons with disabilities, although its scope is significantly broader.

1. *Rehabilitation Act of 1973*

Section 501 of the Rehabilitation Act[15] requires federal agencies to adopt affirmative action plans for the hiring, placement, and advancement in employment of persons with disabilities. The internal hiring practices of the Department are subject to this requirement. Complaints are processed by the Equal Employment Opportunity Commission and, in very limited circumstances, by the Merit Systems Protection Board.

Section 504 of the Rehabilitation Act[16] prohibits discrimination on the basis of handicap by recipients of federal financial assistance against otherwise qualified handicapped persons. Section 504 was originally enacted in 1973 (Public Law 93-112). Amendments enacted in 1978 significantly expanded the scope of the statute by covering for the first time programs or activities conducted by executive branch agencies. Prior to this amendment, activities of the executive branch agencies were not subject to the same anti-discrimination requirements applied to recipients of federal assistance.

Pursuant to Executive Order No. 11914,[17] the Department of Health, Education, and Welfare was given lead responsibility for developing government-wide section 504 regulations. This lead responsibility for implementation and coordination was reassigned to the Department of Justice in 1980 by Executive Order No. 12250.[18]

The HHS regulations implementing section 504 were first promulgated in 1977[19] and have existed in relatively unchanged form since that date. The prior regulations were retained, despite the fact that several portions of these regulations apply largely to programs that are no longer under the jurisdiction of HHS.

The major section 504 regulatory initiative pertaining to HHS during the Reagan Administration was the promulgation of regulations relating to Health Care for Handicapped Infants (the "Baby Doe" regulations). This effort will be discussed in section III ("Attempts to Change the Law").

2. *Hill-Burton Act*

Public Law 88-443, popularly known as the Hill-Burton Act, provided federal grants and loans to assist in the construction and modernization of hospitals and other medical facilities. Although funds are no longer being provided under the Act, one important legacy remains--the Hill-Burton community assurance.

In order to receive approval of an application for funds, the Act required two types of assurance from applicants. The first of these assurances became known as the "charity care" assurance and required facilities to make a certain amount of services available to medically indigent persons. The second of these assurances became known as the "community service" assurance and required facilities to make their services available to all persons in the service area of the facility.

The community service assurance regulations were first promulgated in 1972.[20] Because the charity care obligation generally applied for only 20 years after the completion of construction of the facility financed with the federal grant or loan, and since no new grants or loans have made for several years, the charity care assurance has diminished in importance in comparison to the community service assurance.

The regulations[21] require facilities to make their services available by participating in third-party programs, but also to take additional steps necessary to make their services available. This latter provision is the only legal rationale for the imposition of certain requirements on medical providers beyond the non-discrimination requirements of section 504. For example, under the community service assurance, hospitals may be obligated to require doctors seeking hospital admitting privileges to participate in the Medicaid and Medicare programs.[22] And a hospital may be required to select a different site for expansion or to provide its own transportation services for patients with disabilities.[23]

Enforcement of the Hill-Burton community service assurance is therefore of special importance to persons with disabilities. This obligation complements and supplements requirements imposed on medical providers by section 504. Access to needed services is increased through compliance with this assurance for those persons most often critically dependent on the availability of medical services. Pursuant to a 1980 memorandum of agreement, the Office for Civil Rights enforces the Hill-Burton community service assurance.

III. Shaping the Development of the Law

During the past eight years, attempts to change the civil rights laws affecting persons with disabilities have occurred in several ways. First, positive changes were either not implemented at all or only after great delay. Second, Administration positions in litigation often sought to achieve restrictive interpretations of governing law rejected by Congress and by the courts. Third, efforts were directed at somewhat anomalous problems, with a resulting inattention to critical priority areas. Fourth, ineffective and sometimes incompetent staff were recruited to implement civil rights enforcements programs. The following examples highlight each of these problems.

A. The "Effects" Test

As in other areas of civil rights enforcement, especially during the first term of the Reagan Administration, the Office for Civil Rights attempted to enforce civil rights laws only in cases involving discriminatory treatment and not merely discriminatory impact. This was true despite the repeated decisions of the United States Supreme Court upholding the effects test.

Neither the Congress nor the Supreme Court were receptive to such attempts by the Reagan Administration to restrict the scope of civil rights enforcement.[24] The new Administration could have a substantial positive impact by heightening attention to cases of civil rights discrimination involving discriminatory impact.

B. The Baby Doe Regulations

A common criticism of the Reagan Administration's civil rights record was that Administration officials believed that civil rights began at conception and ended at birth. The "Baby Doe" initiative attempted to extend this unfortunate civil rights approach to the first few days of life.

In April, 1982, the parents of a Bloomington, Indiana infant with Downs syndrome and other disabilities refused consent to surgery to remove an esophageal obstruction that prevented oral feeding. After the hospital initiated judicial proceedings to override the parents' decision, an Indiana trial court denied the requested relief. The local Child Protection Committee was called in by the court for advice and, after conducting its own hearing, the Committee approved the court's decision. The child died six days after its birth.

On May 18, 1982, the Office for Civil Rights sent out a notification to health care providers reminding them that newborn children with such disabilities as Down's syndrome are protected by section 504.[25] An Interim Final Rule was then issued on March 7, 1983.[26] The Interim Rule required health care providers subject to section 504 to post notices in conspicuous places in delivery wards, maternity wards, pediatric wards and nurseries advising of the applicability of section 504 and established a telephone "hotline" to report suspected violations of the law to HHS.

On April 6, 1983, a complaint was filed by the American Hospital Association and other parties challenging the Interim Final Rule. On April 14, 1983, a federal district judge invalidated the Interim Final Rule as "arbitrary and capricious and promulgated in violation of the Administrative Procedure Act."[27]

On July 5, 1983, the Department issued a new notice of proposed rulemaking (NPRM).[28] The NPRM shared many of the same requirements as the Interim Final Rule, including notices, expedited access to medical records, and expedited compliance action. In addition, the proposed rulemaking sought to require federally-assisted state child protective services agencies to utilize their "full authority pursuant to State law to prevent instances of medical neglect of handicapped infants." These proposed regulations were promulgated as final rules on December 30, 1983, effective February 13, 1984.

On March 12, 1984, the American Hospital Association and other parties amended their prior complaint and were joined by the American Medical Association and others in a challenge to the new regulations. This challenge ultimately reached the United States Supreme Court in *Bowen v. American Hospital Association.*[29]

The Supreme Court rejected the arguments offered by the Secretary in support of these regulations. The Supreme Court first found that there was no evidence that any hospital had failed or refused to provide treatment to a handicapped infant for which parental consent had been given. As a result, there was no basis for finding that handicapped children might be subjected to discrimination by recipients of federal financial assistance. The second ground urged was that a hospital's failure to report parental refusal to consent to treatment violates section 504. Again, the Supreme Court found no factual basis for this ground for jurisdiction. The final regulations therefore met the same fate as the Interim Final Rules' judicial invalidation.

C. Coverage of Employment

Shortly after the enactment of the Rehabilitation Act in 1973, thorny questions were raised regarding the extent to which section 504 prohibits discrimination on the basis of handicap in employment. Title VI of the Civil Rights Act of 1964 has a specific provision limiting employment coverage to programs whose primary purpose is to create employment. No such provision is present in the text of section 504.

After one federal circuit took the lead in limiting the scope of section 504 to federally-assisted programs that had a primary purpose of encouraging employment, the Office for Civil Rights reviewed ways to address employment discrimination by recipients of federal financial assistance. One of the approaches used by the Department prior to 1981 was to prohibit employment discrimination by recipients of federal financial assistance regardless of the purpose of the program, as long as the employment discrimination had an adverse effect on program beneficiaries. Since nearly all employment discrimination would have such an impact, it was difficult to envision employment discrimination that would be tolerated.

The Reagan Administration took the contrary position that employment discrimination would only be covered if the purpose of the federal financial assistance was to encourage employment. Many complaints were therefore rejected as not providing any basis for federal monitoring.

This restrictive interpretation was ultimately repudiated by the United States Supreme Court in *Consolidated Rail Corp. v. Darrone.*[30] The brief for the government had argued that employment discrimination should only be prohibited in those programs or activities where the federal financial assistance was directed towards employment. The Court ruled that section 504 reached employment discrimination by recipients of federal financial assistance regardless of the purpose of the federal financial assistance.

D. Human Experimentation

Most of the major programs administered by the Department of Health and Human Services are entitlement programs with relatively specific statutory requirements. Often these requirements limit the discretion of the agency in efforts to control costs and limit federal and associated state expenditures.

Despite these statutory requirements, Congress has also authorized the Secretary of Health and Human Services to waive congressionally mandated requirements in certain limited circumstances. For example, waiver is permitted pursuant to section 1115 of the Social Security Act when necessary to allow demonstration projects to test methods of improving the delivery of care and services. Unfortunately, in the Reagan Administration, this waiver authority has sometimes been utilized to eliminate beneficiary protections in order to cut costs at the expense of care and services.

The courts have held that the exercise of discretion by the Secretary of his/her waiver authority is largely unreviewable. For example, in the early 1970's, the Department of Health, Education and Welfare, invoking its demonstration authority (under section 1115 of the Social Security Act) over Medicaid and other Social Security programs, implemented several costsharing demonstration projects. One of these projects was sought by the California administration of then-Governor Reagan.

These experiments, which had none of the attributes of "research," imposed significant copayment requirements on disabled beneficiaries and others in amounts high enough to threaten their ability to gain financial access to health care. Litigation was brought to halt the projects on the ground that they did not constitute valid research and that they fell outside the scope of the type of valid research permitted under the Secretary's demonstration authority.

The California waiver sought to impose significant costsharing requirements on the poorest Medicaid recipients to see if access to unnecessary services could be discouraged. Attorneys for the recipients argued that access to both unnecessary and necessary services would be prevented, with a resulting deterioration in the health of the recipients. Despite extensive expert testimony in support of this argument, the legal challenge to the California demonstration project was rejected by the federal courts.[31] The courts ruled that the waiver authority was committed to the sound discretion of the Secretary of HEW. All of the fears articulated by the recipient attorneys in their challenge were later fully documented by an independent evaluation of the project funded by the Department.

Since waivers are to be granted only for "demonstration projects," attorneys for program beneficiaries utilized a different approach in challenging future waivers. This approach maintained that since the waivers were designed to test different theories of administration, and since human subjects were being studied, experimentation on human subjects was occurring. Human experimentation regulations,[32] were issued by the Assistant Secretary for Health to protect human subjects participating in research under projects funded in part by the federal government. These regulations require project review by Institutional Review Boards (IRB) to ensure that human subjects will be protected. Since most waivers were simply cost-cutting measures that would have been barred by statutory protections if they had not been packaged as demonstration projects, all parties knew that extension of the human experimentation regulations to this type of research would doom these types of waivers.

The first case to raise this issue was a challenge to a waiver in Georgia nearly identical to the California waiver. The federal court in this case found that human experimentation regulations were applicable to this type of "research." There had been no review by appropriate institutional review boards to ensure that the research was appropriate, that consent had been adequately ob tained, or that risks to the subjects involved had been limited. As a result, the waiver was enjoined.[33]

The reasoning of this decision was used to block many such projects across the country. In 1977, the Carter Administration, in response to this federal court decision invalidating the Georgia demonstration project, expressly applied the National Institutes of Health's protections of the subjects of human experimentation to all future Social Security demonstration projects. This action brought cost-sharing experiments and other attempts to restrict services that required waivers to a halt.

On March 4, 1982, the Reagan Administration promulgated emergency regulations suspending the human subject protections that had stopped the waiver demonstrations.[34] Two months later, the Administration, which was seeking major new Medicaid costsharing requirements as part of its Fiscal Year 1983 legislative budget package, simultaneously solicited states to again apply for costsharing demonstration projects.

On March 22, 1982, the Reagan Administration proposed to exempt entire programs of research and demonstration projects from the human experimentation safeguards.[35] These included projects in child welfare programs, SSI, and other public benefit programs, head start, and programs for the developmentally disabled. Thousands of disabled persons and others would placed at risk by this change. Fortunately, this proposal to eliminate most legislative safeguards and limitations on agency discretion was never finally adopted.

When the Senate Finance Committee finally considered the Administration's proposals, it not only rejected many of the Administration's proposals but added new safeguards of its own. The Committee exempted most children under 18 and pregnant women entirely from all copayment requirements, thereby providing a broader standard of protection than that which had existed under prior law.

E. Failure to Promulgate Section 504 Regulations

On February 16, 1988, the Department published a notice of proposed rulemaking to implement the then ten-year-old 1978 amendments to section 504 of the Rehabilitation Act of 1973 (P.L. 95-602) which extended section 504 to federal agencies.[36] Final regulations were finally issued in July 1988.[37] As a result of this lengthy delay, other operating components within the Department have had little guidance in evaluating their obligations under Section 504.

On January 21, 1986, the Department published a notice of proposed rulemaking to implement the nondiscrimination requirements applicable to block grants authorized by the then five-year-old Omnibus Budget Reconciliation Act of 1981.[38] The comment period for these regulations expired on March 24, 1986. Final regulations have yet to be issued; interim final rules were to be published in September 1988. In the absence of regulations, state and other agencies have had little guidance in deciding what policy decisions as to funding allocations and services have civil rights implications under the Budget Reconciliation Act.

F. Medicaid Amount, Duration, and Scope Limitations

Medicaid regulations[39] have traditionally permitted state agencies to impose limitations on the amount, duration, and scope of services, based on such criteria as medical necessity or utilization review. In the early 1970's, states began restricting Medicaid benefits as cost-cutting measures by imposing across-the-board criteria unrelated to medical necessity or utilization review.

One common limitation was to impose a cap on inpatient hospital days that would be reimbursed under the State plan. In 1981, the director of the Tennessee Medicaid program decided to institute a variety of cost-saving measures, including a reduction from 20 to 14 in the number of inpatient hospital days per fiscal year for which the Tennessee Medicaid program would reimburse hospitals on behalf of Medicaid recipients.

When the Tennessee action was first proposed in 1980, the Office for Civil Rights responded to a complaint and conducted an onsite review. Statistics were obtained from the state agency and extensive statistical analysis was conducted. This analysis demonstrated that the limitation would have a disproportionate adverse effect on disabled Medicaid recipients who would be more likely to require lengthier hospitalizations.

The evidence indicated that more than 4 times as high a percentage of handicapped persons would not have their needs for inpatient care met as the percentage of nonhandicapped persons (16.9% to 4.2%). The Office for Civil Rights also found that there were other measures that could have been utilized to reduce costs that would have had a less disproportionate adverse effect on handicapped persons. For these reasons, the Office for Civil Rights advised the state agency that implementation of the proposed changes would place the Tennessee program in violation of section 504 of the Rehabilitation Act of 1973.

Tennessee went ahead with its actions after the change in Administrations in 1981. By that time the position of the Office for Civil Rights had changed and the Medicaid limits were no longer opposed. Attorneys for affected Medicaid recipients in Tennessee then challenged the state action on the basis of the prior OCR findings. Although the Court of Appeals for the Sixth Circuit found that a prima facie violation of Section 504 had been established and remanded the case for further proceedings, the Supreme Court reversed that decision in *Alexander v. Choate*.[40]

The Supreme Court concluded that so long as handicapped individuals were provided with meaningful access to program services and were not provided with less services than nonhandicapped individuals, no violation of section 504 was established. Interestingly, the Supreme Court decision does not even note the change in position of the agency responsible for the interpretation and enforcement of section 504--the Office for Civil Rights.

The decision in *Alexander v. Choate* has opened wide the door to disparate impact discrimination. That door should be closed as soon as possible through administrative rulemaking or legislation to minimize harm done to Medicaid recipients with disabilities.

G. Medicare Anti-Dumping Regulations

The dumping of patients by hospitals has received increasing national attention over the past eight years. Exacerbated in part by the implementation of diagnosis-related reimbursement for inpatient hospital services, hospitals have been increasingly reluctant to serve undesirable patients. These undesirable patients include those without health insurance coverage and those likely to require lengthier inpatient stays. Persons with disabilities are disproportionately likely to lack insurance coverage and the means to pay for medical care.

Such patients are sometimes denied admission by private hospitals and instead are "dumped" on public or community hospitals. For example, documented incidents of women in labor being turned away from private hospitals abound.

In response to these problems, Congress enacted the Medicare anti-dumping provisions in 1986. These provisions require hospitals to provide medically necessary care or to arrange a medically appropriate transfer as a condition of participation in the Medicare program. Penalties, including a private right of action, were authorized.

Although problems continue to persist, the Administration delayed two years in issuing a notice of proposed rulemaking. Final regulations have yet to be promulgated.

IV. Failures of Enforcement

The failures of the Office for Civil Rights of the Department of Health and Human Services during the past eight years can be identified in five different areas, corresponding to the five primary areas of OCR responsibilities.

In 1986, the Committee on Government Operations of the House of Representatives conducted an oversight hearing on the Office for Civil Rights in the Department of Health and Human Services during the Reagan Administration. The failures highlighted by the Committee as a result of this hearing are identified here in regard to the applicable areas of responsibility.[41]

A. Review and Comment

The Office for Civil Rights has the responsibility within the Department and within the federal government generally of providing its insight and expertise on the implications of particular policies, practices, or activities on the interests of persons with disabilities. Before the Reagan Administration, this role was fulfilled by OCR during the policy review and comment process. As proposed policy initiatives were circulated by other branches of the Department and of the federal government, OCR was given the opportunity to concur, to concur with comments, or to nonconcur. By exercising the latter two alternatives, OCR could help make federal policies in a variety of areas more responsive to civil rights concerns.

The policy review role changed and has nearly been eliminated over the past eight years. As noted by the House Committee on Government Operations, OCR has abdicated its responsibility to ensure that HHS policies are consistent with civil rights laws. OCR is no longer "in the loop" for major policy considerations within the Department or within the federal government. From a role of government-wide influence in the development of policy to implement section 504, OCR is now practically invisible when major policy initiatives, such as diagnostic-related groups, Social Security mental impairment criteria, and nursing home standards are debated.

Two different explanations have been offered for OCR's nonparticipation. The Office for Civil Rights may have lost credibility within the Administration as to its technical competence. Under this view, it was eliminated from the policy-making process since OCR input was viewed as a waste of time. Alternatively, the Office for Civil Rights may have been viewed with hostility by the other offices of departments. Under this view, it was eliminated from the clearance loop since it was viewed as an opponent of cost-saving initiatives. It is likely that both of these factors contributed to the present situation.

B. Policy Development

The Office for Civil Rights has the responsibility for developing policy to guide agency complaint investigation and compliance review activities and to guide recipients of federal financial assistance in achieving voluntary compliance with the various civil rights laws. Other than the unsuccessful "Baby Doe" initiative, no policy development has occurred over the past eight years. As emphasized by the House Committee, OCR had failed to advise regional offices on policy and procedure for resolving cases, even when such guidance was requested.

C. Complaint Investigations

The Office for Civil Rights has the responsibility for investigating complaints alleging noncompliance with the civil rights laws within its jurisdiction. Here again, major problems have arisen and continue to exist. The Committee on Government Operations identified six major failures in this area that undercut the integrity of the complaint investigation process.

First, the Committee found that OCR has unnecessarily delayed case processing, thereby allowing discrimination to continue without Federal intervention. Second, the Committee concluded that OCR's voluntary compliance agreements in discrimination cases are insufficient to achieve compliance with Federal civil rights laws and do not secure adequate remedies for injured parties. Third, the Committee determined that OCR had not monitored compliance agreements to assure that recipients adhere to the requirements of the agreement. Fourth, the Committee found that OCR routinely conducts superficial and inadequate investigations. Fifth, the Committee found that OCR routinely fails to formally charge recipients who have violated Federal civil rights laws. Finally, the Committee concluded that OCR had failed to bring to formal administrative or judicial enforcement cases in which OCR had been unable to negotiate a settlement agreement.

D. Compliance Monitoring

The Office for Civil Rights has the responsibility for monitoring compliance by recipients of federal financial assistance with the civil rights laws within its jurisdiction. As noted above, OCR has not monitored compliance by recipients over the past eight years. With regard specifically to the Hill-Burton community service assurance, the House Committee found that OCR had failed to enforce the community service assurance requirements for hospitals built with Federal funds provided under the Hill-Burton Act.

E. Technical Assistance

The Office for Civil Rights is responsible for providing technical assistance to permit recipients of federal financial assistance to comply with the various civil rights laws at the least expense possible and with the minimum possible disruption to recipient activities. Although the agency has not shown any active hostility to this function, technical assistance aimed at voluntary compliance is only effective if recipients believe that enforcement may follow if compliance is not achieved. The elimination of that threat of enforcement has therefore undercut this function as well.

V. Emerging Issues and Challenges

The major emerging issues and challenges relate to discriminatory impact in programs that have not previously been focused on by the Office for Civil Rights. In many ways, these issues will overlap with the emerging issues and challenges involving discrimination on the basis of race, color, and national origin.

For example, in administering the Medicaid program, have the Health Care Financing Administration and the various states adopted methods or criteria of administration calculated to ensure that persons with disabilities have equal access to medical services?

Transportation to necessary medical care is a mandatory service under the Medicaid program.[42] It is of great importance in facilitating access since many mass transportation services are not accessible to persons with disabilities. Since poverty is a criterion for eligibility under Medicaid, the Medicaid transportation requirement may literally be the only potential source of transportation available to persons with mobility impairments in order to gain access to services.

Despite this fact, most state Medicaid transportation systems are legally inadequate. Transportation is not available for Medicaid recipients with mobility impairments needing transportation to necessary medical care. Enforcement of this requirement would narrow the gap faced by Medicaid recipients with disabilities in gaining access to services.

Similarly, many providers of medical services are not accessible to persons with disabilities. Many doctors cannot effectively communicate with persons with hearing impairments. Many pharmacists do not dispense drugs in labeled containers accessible to persons with vision impairments. Many ancillary providers have offices in buildings that are not accessible to persons with mobility impairments.

All of these providers of medical services are recipients of federal financial assistance and are therefore subject to section 504.[43] However, almost no enforcement actions have been brought against these "private" providers of services. Since many state anti-discrimination laws do not reach these types of settings, there is a special need for the Office for Civil Rights to address compliance by this class of recipients.

All states receive federal financial assistance to defray some of the costs of providing foster care for children who have been removed from their parental home. Special needs should be addressed for those children with disabilities in foster care. Most states do an inadequate job of providing these children with equally effective foster care services. For example, special foster care placements are required for children with emotional handicaps. In the absence of appropriately trained special foster care parents, these children face a disproportionate risk of institutionalization. This risk is too often realized as a result of the failures of states to provide equally effective foster care services for children with disabilities.

By thumbing through a directory of HHS programs, one can identify numerous other fruitful targets for review. But OCR has failed to really consider these issues or to develop policies and procedures for eliminating the discriminatory treatment that occurs. That remains the major unfinished task of the Office for Civil Rights.

VI. Recommendations

A. Recommendations of the House Committee on Government Operations

As a result of the oversight hearing conducted in 1986 by the Human Resources and Intergovernmental Relations Subcommittee of the Committee on Government Operations, the following recommendations were issued by the Committee:

1. OCR should establish a tracking system for cases in both headquarters and the regional offices.
2. OCR should establish a requirement that policies be developed for all possible violations and that they be developed within reasonable timeframes. These policies should ensure that appropriate corrective action for all violations must be taken within a reasonable period of time.
3. OCR should develop guidelines to ensure that all voluntary compliance agreements achieve compliance with Federal civil rights laws and secure adequate relief for injured parties.
4. OCR should carefully monitor all recipients during the period when they are implementing corrective action after a voluntary compliance agreement has been signed. Recipients should be found in compliance only after all corrective action has been accomplished.
5. OCR should look for pattern and practice violations during investigation of discriminatory conduct by recipients through complaints and compliance reviews.
6. OCR should establish an intensive training program for its investigators.
7. OCR should reinstate a substantive quality assessment review of cases in all regions and training should relate to quality assessment findings.
8. OCR should require written documentation of communications between headquarters and regional office staff regarding policy, legal, and factual issues that must be resolved in order to process cases.

9. In cases in which a violation is found, OCR should send a letter of findings and then should attempt to achieve a voluntary settlement agreement, basing this agreement on the findings and the actions necessary to correct the violations.

10. If a recipient fails or refuses to take corrective action after a violation has been found, OCR should take formal enforcement action.

11. OCR should reclaim its rightful role in the department's internal review and clearance process for policy and program initiatives.

12. OCR should take a more aggressive posture regarding enforcement of the community service assurance requirements for hospitals built with the assistance of funds authorized under the Hill-Burton Act.

B. Major Problem Areas

With the previous recommendations in mind, the following are some of the more specific critical changes that need to be made.

1. *Policy Initiatives*

In the relatively short time that the Office for Civil Rights has been focusing on health and human services programs, it has yet to meet one of the primary needs--to promulgate policies specifically addressing discrimination in the various health and human services programs in its jurisdiction. To expedite this process, many of these initial policy initiatives could be issued in the form of guidelines.

2. *Appropriate Staffing*

Some of the problems identified by the Committee on Government Operations in the Office for Civil Rights in the Reagan Administration were the product of incompetent appointees who abused their positions. Such problems can be remedied by the appointment of competent, high-level officials committed to the mission of the agency.

Some of the problems identified are more institutional in nature and require institutional solutions. Recruitment of committed staff throughout the agency must be undertaken by the incoming Administration. The attitude of the Reagan Administration to civil rights concerns has led to an exodus of many competent mid-level managers and other staff. Similarly, these individuals must be trained to effectively perform the OCR mission. Such training, as has been conducted, has tended to focus only on civil rights concerns. Since OCR does not fund many programs of its own, OCR staff need to learn the ins and outs of the many programs within HHS. Only when this is accomplished will OCR staff be in a position to effectively enforce compliance by recipients and effectively contribute to the development of policy in other operating components of the Department.

3. *Appropriate Funding*

Sufficient numbers of competent staff are only part of the answer. Employees need sufficient funding to realize their mission. For example, from 1981-1986, while the Director of OCR was traveling all over the world, investigative staff did not have sufficient funds to conduct onsite complaint investigations. In the absence of funding for transportation to sites, only inadequate paper reviews can be conducted.

Funding for computer analysis is also essential. When surveys are conducted, computer analysis is necessary to identify fruitful areas for further inquiry. And computer analysis should not be restricted to data generated by OCR itself. For example, computer analysis may be needed of data maintained by such other agencies as the Health Care Financing Administration. By analyzing this data, OCR staff may identify areas for needed policy development, compliance reviews, or other efforts. The Office for Civil Rights has made little effort in this area.

4. *Review and Comment*

It is essential for the Office for Civil Rights to get back in the loop for policy development within the Department of Health and Human Services. OCR involvement should not be viewed as a substitute for sensitivity to civil rights issues generally throughout the principal operating components of the Department. However, since all of the other units must balance numerous considerations in the development of policy, it is critical that one component, the Office for Civil Rights, have as its primary responsibility the realization of equal access to equally effective services for all our citizens. OCR involvement can therefore elevate this concern when necessary to Secretarial level for significant policy decisions.

5. *Voluntary Compliance*

One of the traditional tools used by the Office for Civil Rights to monitor compliance has been the use of surveys. These surveys are directed at particular classes of recipients and can be utilized in three ways. First, responses to survey questions can be used to identify fruitful areas for technical assistance. For example, answers obtained in a survey of hospitals may identify a problem regarding communications abilities of hospital staff with patients with hearing impairments in emergency settings. With these findings in mind, OCR can develop specialized materials and work with appropriate trade associations to address this problem in a cost-effective and efficient manner.

Second, the responses to survey questions can be used to target voluntary compliance reviews. For example, answers obtained in a survey of welfare agencies may indicate an absence of forms accessible to persons with vision impairments. OCR staff could then verify these responses with affected recipients, develop voluntary compliance agreements, and monitor the implementation of these agreements.

Third, the responses to survey questions can be used to identify areas in which additional policy guidance is appropriate. For example, answers obtained in a survey of foster care agencies may indicate that children with disabilities receive more institutional placements and remain in these institutions for longer periods of time. OCR, in conjunction with the Office of Human Development Services, may then develop policies targeted at foster care agencies to identify possible areas of violation and to suggest possible approaches to compliance.

In light of the enormous number of recipients of federal financial assistance from the Department of Health and Human Services, it would be impossible to conduct compliance reviews of an adequate number of recipients even with a large additional commitment of resources. Recipient surveys provide an opportunity to expand the scope and impact of OCR activities without greatly increasing resources. At the same time, a properly designed survey can obtain needed information without imposing a significant burden on recipients.

[I]n facing an epidemic that has presented a real test of the moral fiber of our nation, thoughtful executive leadership to protect the civil rights of this group of people has been sorely lacking.

CHAPTER XXVII

AIDS AND HIV INFECTION

by Chai Feldblum

I. Introduction

People who have AIDS or who are infected with the Human Immunodeficiency Virus (HIV) are no different from other people with disabilities. They experience discrimination in employment, housing, public accommodations and health care as do other people with disabilities. In normal circumstances there would be no reason to include a separate section on people with AIDS and HIV infection in a chapter on disability. The reality, however, is that the Reagan administration and others sought to treat individuals with AIDS and HIV infection *differently* from individuals with other disabilities. Thus, apart from the general failure of the Reagan Administration to adequately protect the civil rights of people with disabilities, people with AIDS and HIV infection have suffered from specific attempts to reduce the extent of protection available to them. In facing an epidemic that has presented a real test of the moral fiber of our nation, thoughtful executive leadership to protect the civil rights of this group of people has been sorely lacking.

II. Definition of the Problem

One of the most virulent aspects of the AIDS epidemic has been the acts of irrational discrimination directed against people with AIDS or people who carry the AIDS virus (HIV). Such individuals have been fired from jobs, evicted from apartments, precluded from entering restaurants, swimming pools, boarding airplanes, denied health care services by doctors and dentists, their health insurance, and have even been denied haircuts and manicures. Children with AIDS or HIV infection have been ordered by school boards not to attend school.

It is not only the person with AIDS or HIV who experiences discrimination. A mother whose son has AIDS, a person who volunteers in an AIDS buddy-system, and doctors who provide care for people with AIDS often experience the same discrimination as that directed against those they care for.

A mother whose son has AIDS, a person who volunteers in an AIDS buddy-system, and doctors... often experience the same discrimination as that directed against those they care for

In many respects, the discrimination suffered by people with AIDS and HIV infection is generated by the same type of fear, ignorance, and stereotypes that has generated discrimination against people with other disabilities. Indeed, AIDS in the 1980s is the focus of the same type of fear, stereotyping, and stigmatization that have been targeted against people with disabilities such as epilepsy, cerebral palsy, mental illness, and tuberculosis--attitudes that were particularly intense during past decades and continue to this day.[1]

In certain respects, however, the discrimination against people with AIDS and HIV infection is heightened by the wide-spread awareness that AIDS is currently an incurable and fatal disease and by the fact that the majority of individuals with AIDS or HIV are members of two classes that have historically suffered discrimination in this country--gay men and intravenous drug users.

III. Statement of Governing Law

Section 504 of the Rehabilitation Act of 1973, which protects all people with disabilities from discrimination by federal agencies, and by entities that receive federal funds, protects people with AIDS and HIV infection as well. Section 504 has been successfully used in various cases to persuade courts to order schools to allow children with AIDS and HIV infection back into the classrooms,[2] and to reinstate employees into former jobs.[3] In addition, Section 504 is currently being used in litigation to challenge the exclusion of individuals from various health care services,[4] and to resist demands to undergo inappropriate mandatory HIV antibody testing.[5]

In almost all cases brought under Section 504, the plaintiffs have prevailed based on the medical and public health consensus that people with AIDS and HIV infection do not pose a significant threat of transmitting the virus to others in ordinary settings. Such individuals have almost always been found to be "otherwise qualified" under Section 504 for the position or services they seek. The only exception to this rule has been one district court case upholding, on somewhat tenuous legal and medical reasoning, the mandatory testing program of the State Department for Foreign Service personnel on the grounds that HIV infected personnel were not "otherwise qualified" to serve overseas.[6]

IV. Efforts to Change the Law

The Reagan Administration's efforts in the area of civil rights protection for people with AIDS and HIV infection have taken two forms: first, active efforts to reduce the scope of protection available to such individuals; and, second, passive resistance in the face of efforts by various members of Congress to reduce the scope of such protection.

A. The Department of Justice's 1986 Memo on People with AIDS and HIV Infection.

In the spring of 1986, the Department of Justice's Office of Legal Counsel issued a memorandum regarding the application of Section 504 to people with AIDS, AIDS-Related-Complex (ARC), and HIV infection. The memorandum was written in response to a request from the General Counsel of the Department of Health and Human Services, whose Office of Civil Rights had received complaints from workers employed by hospitals and clinics who had been discriminated against because they had AIDS or were HIV infected.

The Justice Department concluded that a person with AIDS would be protected under Section 504 if an employer had discriminated against the person because of the *disabling effects* of the disease. Thus, if a person with AIDS was weaker and had difficulty in walking or breathing, and an employer discriminated against the person on those grounds, the individual with AIDS would be protected.

By contrast, the Justice Department concluded that the ability of an individual to *transmit* a disease was not a handicap under Section 504. Thus, if an employer discriminated against a person with AIDS, a person with HIV infection, or indeed a person with any disease, because of the employer's fear that the individual could *transmit* the disease to others, that individual was not protected. The Justice Department emphasized that such individuals were not protected regardless of how "irrational" or "unreasonable" the fear of contagion might be.

The practical effect of the Justice Department memo, had it been followed by the courts, would have been to deny civil rights protection to almost every individual with AIDS, HIV infection, or any other infectious disease. In almost all cases of discrimination against such individuals, employers could have argued that their discriminatory actions were motivated not by the possible disabling effects of the individual's disease but because the employer (or other defendant) was concerned, even unreasonably, with the possible risk of contagion posed by the infected individual.

As discussed below, nondiscrimination protection for people with AIDS and HIV infection, in opposition to the Justice Department's view, was subsequently affirmed by the Supreme Court and by Congress. Such protection, however, was gained in the face of both active and passive resistance on the part of the administration.

B. School Board of Nassau County v. Arline

In December 1986, the Supreme Court heard a case in which the Justice Department officially put forth its narrow view of the protection of Section 504 for people with contagious diseases, including AIDS and HIV infection. The case, *School Board of Nassau County v. Arline*, involved Gene Arline, a teacher with tuberculosis, who had been fired from her job. A district court in Florida ruled that *all* individuals with contagious diseases, including tuberculosis, were not protected under Section 504 because the judge could not conceive that Congress intended to extend protection to people with such diseases. An appellate court for the Eleventh Circuit reversed the district court, ruling that Congress clearly intended to cover people with *all* kinds of diseases, including contagious diseases. The court noted that the main qualification within Section 504 was that such individuals had to be "otherwise qualified", that is, they could not pose a health risk to others.

In an *amicus* brief before the Supreme Court, the Justice Department argued that a person who suffered disabling effects as the result of a contagious disease could be protected under Section 504. Nevertheless, the Justice Department urged the Court to rule against Gene Arline in this case because the school had fired her based simply on the *fear of contagiousness* of tuberculosis. Referring to its recent memorandum, the Justice Department argued that Section 504 did not extend protection on such grounds.

In March 1987, the Supreme Court rejected the Justice Department's argument by a 7-2 vote. The Court ruled that Congress did intend to cover people with contagious diseases under Section 504, and that Gene Arline fit the definition of a "person with handicaps" under Section 504. The Court also rejected the Justice Department's analysis, stating it did not agree that:

> "in defining a handicapped individual under section 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant. . . . It would be unfair to allow an employer to seize upon a distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment."[7]

In so ruling, the Court explicitly rejected the analysis of the Justice Department and reaffirmed the protection provided by Section 504 for people with contagious diseases.

As the lower court had done, the Supreme Court also noted that Section 504 included the requirement that an individual with a contagious disease must be "otherwise qualified." In order to meet that requirement, according to the Court, the individual could not pose a significant risk of communicating the infectious disease to others in the workplace, if the risk could not be eliminated by a reasonable accommodation. This ruling by the Court was in accord with longstanding case law under Section 504.

C. Civil Rights Restoration Act of 1987

In March 1988, the Senate and House overrode President Reagan's veto and passed the Civil

Rights Restoration Act of 1987. This bill overturned the Supreme Court's decision in *Grove City College v. Bell*,[8] which had placed a limited definition on the term "program or activity." That term appears in four statutes prohibiting discrimination by entities receiving federal financial assistance. One of the statutes positively affected by the broadening scope of the Civil Rights Restoration Act was Section 504 of the Rehabilitation Act of 1973. Thus, the Civil Rights Restoration Act was of critical importance to all people with disabilities, as well as to various other groups affected by the civil rights statutes.

The Reagan administration opposed the Civil Rights Restoration Act from the onset, and President Reagan ultimately vetoed the bill. In addition, the administration was silent in the face of efforts to specifically exclude people with contagious diseases from the existing protection of Section 504. In the Senate Labor and Human Resources Committee, Senator Gordon Humphrey (R-NH) offered an amendment that would have overturned the Supreme Court's *Arline* decision by establishing that people with contagious diseases were not covered under Section 504. The Reagan administration, which made its views known on several other amendments offered at the time, was silent in the face of this amendment. Through concerted efforts on the part of the entire disability community, the Humphrey amendment was defeated by a vote of 2 to 14 in committee.

Senator Humphrey sought to restrict the scope of Section 504 coverage for people with contagious diseases once again when the Civil Rights Restoration Act reached the Senate floor. The efforts of the disability community resulted in an alternative amendment that simply codified the "otherwise qualified" standard of Section 504 for people with contagious diseases. This amendment was designed to reassure employers regarding the qualifications standards of Section 504, while still maintaining complete protection for people with contagious diseases, including people with AIDS and HIV infection. Again, the Reagan administration was silent throughout this debate.

D. The Fair Housing Amendments Act of 1988

In August 1988, the House and Senate passed the Fair Housing Amendments Act of 1988, and in September 1988, President Reagan signed the bill into law. The Fair Housing Amendments Act represented a giant step forward in advancing the civil rights of all people with disabilities. For the first time, antidiscrimination protection for people with disabilities was extended *outside* of the *public* sector. Under the bill, discrimination in housing was prohibited on the part of *all private* individuals and entities, not simply on the part of those individuals or entities who receive federal funds, the scope of protection currently provided by section 504. Thus, under the Fair Housing Act, as now amended, private landlords and homeowners may no longer discriminate against people with disabilities in the sale, rental or terms or conditions of sale, or rental of housing. In addition, they may not discriminate against those who associate with people with disabilities.

The Reagan administration was lukewarm in its support of the Fair Housing Amendments Act until the final days of the bill's passage in the Senate. Moreover, the Administration was once again conspicuously silent in the face of efforts to specifically exclude people with HIV infection from the protection newly conferred on people with disbilities by the Act. On the floor of the House of Representatives, three amendments were offered to exclude people with HIV infection and people with contagious diseases from the new nondiscrimination housing protections embodied in the bill. The Reagan administration, which noted its public support of or opposition to other amendments offered to the bill, remained completely silent in the face of these efforts.

A bipartisan vote ultimately defeated all three amendments. The Fair Housing Amendments Act, as currently signed into law, protects all people with disabilities from housing discrimination including people with AIDS and HIV infection.

E. Confidentiality

A key to effective public health measures in this country, as well as a key to ensuring that the civil rights of people with AIDS and HIV infection are protected, is the assurance that individuals who undergo HIV antibody tests will have the results of those tests kept confidential. The public awareness that an individual has tested positive on the HIV antibody test can often lead to discrimination in employment, housing, public accommodations, and health care services. Even in those situations where some legal recourse might be available (*e.g.*, in housing or in areas covered under Section 504), forcing individuals to undertake such legal suits is traumatic. In this area, an ounce of prevention in terms of initially ensuring the confidentiality of HIV test results is more than worth the pound of cure in terms of not forcing individuals on both sides to undergo expensive and difficult lawsuits.

The confidentiality of HIV test results are currently protected solely under patient-physician confidentiality provisions that exist in particular states, and, in a few states, by specific statutes. In the spring of 1987, Congressman Henry Waxman (D-CA) and Senator Edward Kennedy (D-MA) introduced legislation establishing, as a matter of federal law, confidentiality protection for individuals undergoing HIV antibody tests. Secretary Otis Bowen of the Department of Health and Human Services testified against the bill, stating that such efforts at protecting confidentiality were better left to the states.

The confidentiality provisions of Congressman Waxman's bill ultimately passed the House of Representatives by a vote of 367-13 in September 1988. Unfortunately, timing prevented these provisions from being included in the final omnibus AIDS legislation passed by the 100th Congress in October 1988.

F. Mandatory Testing

The public health community has long advocated against mandatory HIV antibody testing in the United States, other than mandatory testing of donations of blood, plasma, and organs. Public health officials have noted that testing low-risk populations (such as marriage license applicants or applicants to the military) represents a significant waste of financial resources, can result in a high rate of false positives, and is irrelevant in terms of an individual's ability to do a job or be eligible for services or benefits. A better approach, advocated by public health officials, is an extensive program of education and voluntary testing.

Despite this consensus in the public health community, the Reagan administration has moved forward with a number of programs of mandatory testing. All current members of, and applicants to, the military, the Foreign Service of the State Department, and the Jobs Corp are required to undergo mandatory HIV antibody testing. Inmates in federal prisons are often required to undergo HIV testing, as are all immigrants to this country.

Congress recently rejected a series of additional mandatory testing requirements. In September 1988, various Members of the House of Representatives offered amendments to require states to establish mandatory testing for marriage license applicants and to require routine testing for hospital admittees. The Reagan administration was silent in the face of these efforts. These efforts were ultimately defeated by wide margins and with bipartisan opposition.

G. The Department of Justice's 1988 Memo on People with HIV infection.

The Justice Department did act positively on one aspect of AIDS and HIV infection in the final months of the Reagan Administration. In September 1988, the Justice Department issued a new memorandum on the coverage of people with AIDS and HIV infection under Section 504. In this memorandum, the Justice Department acknowledged that the Supreme Court in *Arline* had rejected the Department's earlier argument that discrimination based on the fear of contagiousness was not covered under Section 504. The Justice Department then went further and concluded that people with asymptomatic *HIV infection* (as contrasted to people with full AIDS) were also covered under Section 504. The Justice Department drew on both the statutory definitions in Section 504, as well as on the legislative history accompanying the Civil Rights Restoration Act, in arriving at its conclusion.

Although the Justice Department position was no different than that already reached by several courts, its memorandum remains of critical importance. The issue of coverage of HIV infection under Section 504 continues to be addressed in litigation. This memo places the Department squarely on record as stating that people with HIV infection are covered under Section 504. As such, the memo will be an important and useful tool in future litigation.

It should be noted that the Justice Department issued its memorandum in response to a call by the President's Commission on the HIV Epidemic that it issue such a legal opinion to remove any confusion remaining from the Department's 1986 memo. The report of the President's Commission represents another, somewhat unexpected, positive effort that occurred during the Reagan administration. The Commission, headed by Admiral Watkins, produced a comprehensive report on the AIDS epidemic, which included in most, though not all respects, recommendations that were positive.

H. Enforcement

Coverage of people with AIDS and HIV infection under Section 504 is meaningless without effective enforcement of the statute. Every published case redressing discrimination against people with AIDS or HIV infection has been brought by private parties across the country. The Offices of Civil Rights in each of the agencies such as the Department of Health and Human Services, the Department of Housing and Urban Development, and the Department of Education have statutory authority and responsibility to prosecute cases of Section 504 violations. Yet, these offices have not been active in enforcing the law, either with respect to all people with disabilities, or with respect to people with AIDS and HIV infection. Such a lack of activity has seriously hindered the appropriate enforcement and development of Section 504 cases.

V. Recommendations

A. The Americans With Disabilities Act

The next administration must place as one of its highest priorities the passage of the Americans with Disabilities Act. This Act would extend to people with disabilities, protection against discrimination in the areas of private employment, transportation, public accommodations, communications, and state and local activities. Passage of the bill would finally outlaw discrimination against individuals on the basis of disability in the same manner that discrimination against individuals on the basis of race, sex, religion, and national origin is currently prohibited.

In addition, the next administration must take a strong, public stand against excluding people with AIDS and HIV infection from the coverage extended by the Americans with Disabilities Act. It is to be expected that several members of Congress will offer such an exclusion, in the same manner that such an exclusion was offered during deliberations on the Civil Rights Restoration Act of 1987 and the Fair Housing Amendments Act of 1988. The next administration must work publicly with the disability and civil rights communities to defeat such an exclusion.

B. Enforcement

The next administration must follow through on the implications of the Justice Department's September 1988 memo. In that memo, the Justice Department expressly noted that people with AIDS and HIV infection were covered under Section 504. The enforcement arm of the Justice Department, as well as the enforcement arms of the other agencies, must now be activated to pursue and prosecute cases of Section 504 violations against people with AIDS and HIV infection. In addition, the next Administration should actively enforce the provisions of the newly passed Fair Housing Amendments Act.

C. Training and Education

The Department of Justice, and other agencies within the government, have a responsibility to ensure that attorneys and people with disabilities across the country are equipped to bring Section 504 cases, in the area of AIDS and HIV infection, as well as in the area of other disabilities. This responsibility for training and education of attorneys and affected parties is especially important following passage of the Fair Housing Amendments Act, which now significantly extends nondiscrimination protection for people with disabilities, including people with AIDS and HIV infection. The next administration could ensure that such appropriate training and education takes place through contracts to existing disability rights legal organizations that currently provide services and training.

D. Confidentiality

It is likely that a bill will be reintroduced in the 101st Congress to establish federal confidentiality protections for individuals who undergo HIV antibody testing. The next administration should vigorously support such legislation and should oppose any efforts to weaken the confidentiality standards in the legislation.

E. Testing

The current administration's programs of mandatory testing for immigrants, prisoners, the military, the State Department, and the Jobs Corp have come under criticism from various sectors and authorities. For example, the Institute of Medicine, in its updated report, *Confronting AIDS*,[9] states: "Mandatory screening programs, especially those aimed at low-risk groups, are likely to be ineffective, counter-productive, and distracting. . . .The Committee believes that, at this time, the only mandatory screening appropriate for public health purposes involves blood, tissue and organ donation."[10] The President's Commission on the HIV Epidemic supported increased voluntary HIV testing;[11] the only mandatory testing supported by the Commission was a limited form of testing for some prisoners.[12] The Commission specifically recommended that the Administration reassess its policy of testing individuals from other countries seeking refuge in the United States.[13]

The next administration should review the usefulness and purpose of the current mandatory testing programs, with an eye toward eliminating, or significantly modifying, such programs. In addition, the next administration should oppose further efforts towards mandatory testing and mandatory reporting which are uniformly opposed by the medical, public health, disability, and civil rights communities.

CHAPTER XXVIII

CIVIL RIGHTS AND PERSONS WITH DISABILITIES: THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

by Bonnie Milstein

> *[T]he nation's store of public housing continues to be largely inaccessible--structurally as well as through discriminatory policies.*

I. Definition of the Problem/Evidence of Discrimination

Until 1973, when the Rehabilitation Act was enacted, the public was generally unconcerned about the problems of everyday living (including housing) that affected individuals with disabilities. In fact, most Americans believed they belonged in institutions, nursing homes, or with their families, where they would be safe, where the community could be safe from them, and where they could get the medical attention they needed.

This attitude resulted in the failure of government and of the housing industry to perceive people with disabilities as housing consumers. As a result, only those who could afford to build or modify their own homes were able to live independently in housing of their choice. Even those who did not need ramps or other physical accommodations to gain access to desired housing were often rejected as tenants because landlords feared that renting to a visually impaired tenant, for example, would cause problems with the neighbors or would increase the landlord's liability. Likewise, anyone who had a learning or mental disability was automatically rejected because of the prejudicial assumption that such a person could not be expected to pay the rent or to maintain the apartment in a safe and sanitary manner.

Part of the judicial and community activities of the 60s and 70s focused on people inside closed institutions for the mentally retarded and the mentally ill, as well as on people with other disabilities who, although they were not institutionalized, were nonetheless kept out of the mainstream of American life. As a result of increasing political activism of persons with disabilities, as well as the growing recognition that it was financially and morally inappropriate to restrict people with disabilities to institutions, attention began to focus on existing housing that could be adapted to the needs of a specific individual; housing that could be built to be either adaptable or accessible, and housing that could be linked to supportive services, provided either in the housing itself or in the community.

Progress toward creating such housing has been piecemeal and slow. As discussed later in this section, the Department of Housing and Urban Development (HUD) failed to publish regulations on handicap discrimination until fifteen years after the enactment of Section 504 of the Rehabilitation Act. Without these regulations, the nation's store of public housing continues to be largely inaccessible--structurally as well as through discriminatory policies. Most public housing projects have accessible apartments only for single individuals, and these are usually located in housing projects limited to elderly and handicapped residents.

The District of Columbia, for example, does not have one public housing apartment that is accessible for a family. Thus, one typical family, two of whose children have muscular dystrophy and use wheelchairs, has waited for years to move out of their substandard, two-story walk up. In the past, helpful neighbors carried the children up and down the stairs and their help was the only reason the children were able to attend school. When the neighbors could no longer help, the children stopped attending school.

Around the country, children and adults languish in hospitals and nursing homes, not because they need acute medical services, but because no accessible, low-income housing exists for them. In armed forces bases here, and around the world, military officials refuse to allow spouses who use wheelchairs or who are otherwise disabled to live in base housing because of fears of increased liability or undefined "trouble." "NIMBY"--"not in my backyard"--has become the catch phrase for neighbors who successfully manipulate local zoning laws to prevent the establishment of community residences for individuals with disabilities who prefer to live with each other rather than with their families, on the streets, or in institutions.

Some progress has been made to ameliorate the housing problems faced by those who have disabilities. Hopefully, the enactment of the Fair Housing Amendments Act of 1988 and HUD's Section 504 Regulations will spur major advances in this area. As discussed more fully later, the Fair Housing Amendments Act prohibits discrimination, in private and public housing, against people with disabilities. The Section 504 Regulations delineate, for the first time, the responsibilities of public housing systems and private recipients of HUD funds to make their buildings accessible and their policies nondiscriminatory.

II. Statement of Governing Laws

A. The Rehabilitation Act of 1973, as Amended.[4]

Section 501 of the Rehabilitation Act[5] requires federal agencies to adopt affirmative action plans for the hiring, placement, and advancement in employment of persons with disabilities. The internal hiring practices of the Department are subject to this requirement.

Section 504 of the Rehabilitation Act[6] prohibits recipients of federal financial assistance from discriminating against people with disabilities in employment, in the provision of benefits, or opporunities to participate in any of the recipient's programs or activities. As a funding agency, HUD has the responsibility of advising its recipients how to conduct their programs and activities in nondiscriminatory ways. HUD also has the responsibility to enforce Section 504, and to terminate the federal funding of any recipient who does not comply with the civil rights statute.

In 1978, the Rehabilitation Act was amended to become the first federal civil rights statute to apply nondiscrimination requirements to activities conducted by the federal government itself. HUD is now in the process of drafting regulations to implement that change in the law.

B. The Architectural Barriers Act of 1968.[7]

The Architectural Barriers Act requires every building subject to the Act to be designed, constructed, or altered in accordance with prescribed standards so as to be accessible to, and usable by, individuals with disabilities. "Building" is defined as any building or facility which is

1 to be constructed or altered by or on behalf of the United States;

2 to be leased in whole or in part by a grant or a loan made by the United States after the date of enactment of this Act (August 12, 1968);

3 to be financed in whole or in part by a grant or a loan made by the United States after August 12, 1968, if such building or facility is subject to standards for design, construction, or alteration issued under authority of the law authorizing such grant or loan....[8]

The Act assigns four agencies the responsibility for setting accessibility standards: HUD, the General Services Administration, the Department of the Interior, and the Department of Defense. A fifth agency is responsible for enforcing the Act, the Architectural and Transportation Barriers Compliance Board (ATBCB). ATBCB's authority derives from Section 502 of the Rehabilitation Act.[9] In 1984, under the supervision of the ATBCB, the four responsible agencies promulgated standards for the implementation of the Architectural Barriers Act. The standards are called the Uniform Federal Accessibility Standards (UFAS).[10]

In spite of its lead agency role in setting accessibility standards for federal and federally assisted buildings, HUD has interpreted the Architectural Barriers Act too narrowly. HUD has taken the position that the Act does not apply to any buildings built or leased with Community Development Block Grant (CDBG) funds, a program through which HUD funnels millions of dollars every year.

C. Section 202 of the National Housing Act[11] and Section 8 of the Housing and Community Development Act of 1974[12]

The purpose of Section 202, as stated in the statute, is to assist private, nonprofit corporations or public agencies "to provide housing and related facilities for elderly or handicapped families."[13] While several of HUD's programs include specific provisions relating to tenants with disabilities, the Section 202 program, combined with the Section 8 program, are "probably the most important financing programs for rental housing for those with disabilities."[14] The Section 202 program provides a direct forty-year loan to private, nonprofit organizations for construction and substantial rehabilitation of permanent housing, with an interest rate below commercial rates. This loan must be combined with the Section 8 housing assistance payments program to further reduce rent levels. Housing may be of any type which services the needs of the residents, and includes group homes for no more than twelve tenants.

The Section 8 program is a rental assistance program that makes housing assistance payments to owners on behalf of eligible tenants. It was designed to assist low-income participants (families, elderly, and those with disabilities) obtain decent housing. Eligible tenants pay a percentage of their income toward rent, and HUD pays the difference between that and the fair market rent directly to the owner.

Because these two programs have resulted in the majority of accessible living units in the country, HUD's interpretation of their provisions is of critical importance. As discussed in greater detail later in this section, HUD's interpretation of the 202 program, in particular, has been so narrow as to perpetuate a segregationist policy.

III. HUD's Role in Shaping the Law

A. Regulations Implementing Section 504 of the Rehabilitation Act

HUD has the ignominious distinction of being the last federal agency to publish final Section 504 regulations applicable to recipients of federal financial assistance.[15] These regulations, which were published on June 2, 1988, have a long and politicized history.

Under Executive Order 11914,[16] President Ford named the Department of Health, Education and Welfare to be the lead agency for the enforcement of Section 504 of the Rehabilitation Act. Pursuant to that mandate, HEW issued government-wide regulations in 1978[17] which the majority of executive agencies, including HUD, adopted as a model. In April 1978, HUD published a set of proposed regulations[18] based on the HEW regulations and held ten public hearings throughout the country. In addition to the 225 witnesses at the hearings, HUD received 258 additional written comments. Like many other agencies, however, HUD failed to publish final regulations before the Reagan administration took office.

Consistent with a clear Reagan administration emphasis upon limiting costs in human services programs, the regulations discouraged property owners from widening passageways, cutting curbs, or amending policies that had discriminatory effects.

The 1978 proposal never resurfaced. Instead, on May 18, 1983, HUD published regulations that were far different from the 1978 proposed regulations.[19] However, ignoring the requirements of the Administrative Procedures Act[20] and case law interpreting it,[21] HUD did not publish these new regulations as a Note of Proposed Rulemaking. Instead, HUD published them as "Interim Final" regulation to take effect the following month, with comments to be accepted through August 4, 1983.

The disability, traditional civil rights and low-income advocacy communities responded immediately and angrily.[22] Threatening litigation, and negative publicity, the hastily created coalition succeeded in convincing HUD to republish its new regulations as a Notice of Proposed Rulemaking. HUD refused, however, to establish the requested ninety-day comment period and instead mystifyingly allowed eighty-three days.[23]

The regulations were insultingly bad. At a meeting between John Knapp, HUD's General Counsel, and the coalition, Mr. Knapp admitted that he had ignored both the HEW government-wide guidelines and HUD's 1978 proposed rules in drafting the 1983 rules, and that he knew nothing about Section 504. In addition, according to others in HUD, Mr. Knapp made it clear that he wanted no assistance from any employee who had worked on the 1978 regulations or on implementing Section 504.

The resulting regulations, not surprisingly, reflected more concern for property owners than for the civil rights of those whom the statute was intended to protect. Project managers, for example, were warned not to accept a disabled tenant unless the manager believed that the tenant would not harm himself or others and would not interfere with others' peaceful enjoyment of their property. General requirements regarding tenants' harmfulness and interference with peaceful engagement appear in every HUD lease. But when those requirements were specifically imposed on a class in the context of civil rights regulations, they perpetuated the stereotype that people who were different--people with disabilities--posed risks that other tenants did not.

Consistent with a clear Reagan administration emphasis upon limiting costs in human services programs, the regulations discouraged property owners from widening passageways, cutting curbs, or amending policies that had discriminatory effects. In fact, the General Counsel advised the coalition that he believed that proving discrimination under Section 504 required proof of intent, and that proof of discriminatory effect was insufficient. Public housing managers were specifically prohibited from adding elevators to public housing structures and were not required to make any physical modifications to existing buildings, no matter how inexpensive or how necessary.

With regard to new construction, HUD capped the number of units that could be designed as accessible at an exceptionally low figure. HUD based its cap on a study of the housing needs of people who used wheelchairs. Unfortunately, the flaws in the study included the fact that it did not count residents of nursing homes, long-term care hospitals, or institutions for the physically or mentally disabled. By counting only those who already lived in the community, the study and the subsequent regulations, would have done nothing to increase the numbers of individuals with mobility impairments who could move from inappropriate settings to residence in the community.

In response to the Notice of Proposed Rulemaking, HUD received more than eleven hundred comments, more comments than had ever been received on any of its proposed regulations. The coalition heard little from HUD over the next five years. Then on June 3, 1988, HUD issued a final set of Section 504 regulations. Coalition members had received an unofficial copy of the regulations a month earlier and were amazed to find that many of their recommendations for change had been incorporated. Conversations with various sources in and out of government suggested that the improvements in the regulations resulted from the General Counsel's surprise at the reaction of the civil rights' community to his regulations and his resulting willingness to involve career HUD and Department of Justice bureaucrats, experienced in Section 504 enforcement, in the revisions of the regulations. While much improved, the regulations still retained inappropriate balances of financial and administrative burdens with accessibility and equal opportunity needs.

Several of the problematic aspects of these final regulations have been addressed by the Fair Housing Amendments Act of 1988.[24] Signed into law on September 13, 1988, the Act conflicts with the regulations in specific and remediable ways. It will be HUD's next task to reissue the regulations with appropriate changes to conform it to the Fair Housing Amendments Act.

B. Policies Promoting Segregation in the Section 202 Program

The Section 202 Program, as mentioned earlier, has been the source of the majority of publicly funded, physically accessible housing available to tenants with disabilities. During the Reagan administration, HUD officials interpreted the Act in such a way as to reduce the availability of 202 housing to individuals with mental disabilities.

The statute makes mortgage loans available to qualified sponsors who wish to develop low cost housing for "elderly or handicapped families," and who will provide services to facilitate the independent living of its tenants.[25] The statute defines a handicapped person as one who is found

> to have an impairment which (a) is expected to be of long, continued, and indefinite duration, (b) substantially impedes his ability to live independently, and (c) is of such a nature that such ability could be improved by more suitable housing conditions.[26]

HUD expanded on this definition in its regulations by separating individuals with disabilities into three categories: the physically handicapped, the chronically mentally ill, and the developmentally disabled.[27] HUD's purpose in distinguishing among individuals with disabilities was to ensure that the sponsor understood the needs of his tenants and was prepared to provide the necessary services.[28]

HUD used the distinctions as guides during the Carter administration. They were useful to the limited extent that generalized labels can be. HUD also understood the need to apply the labels consistently with Section 504 requirements. The motivating premise of Section 504 was that people with disabilities could not be treated on the bases of generalizations, and that deciding whether a particular individual was a "qualified" handicapped person for purposes of a specific program, had to be based on objective, verifiable data.

Thus, during the Carter administration, recipients of Section 202 funds had to assess the needs of each applicant for housing and match the applicant's needs with the services that Section 202 housing provided. Section 202 sponsors were prohibited from denying housing to an applicant because the applicant's disability placed him or her in one category (*e.g.*, chronically mentally ill) rather than another (*e.g.*, physically handicapped).

HUD changed that policy when the administrations changed and memorialized the new policy through unpublished memoranda. On June 7, 1983, Assistant Secretary for Housing, Philip Abrams, issued a memorandum to all HUD offices that permitted Section 202 sponsors to determine the qualifications of disabled applicants based upon their classification in one of the disability categories. On March 30, 1984, his successor, Assistant Secretary for Housing, Maurice Barksdale, issued another memorandum which reinforced the Abrams memorandum: Section 202 sponsors were not required to serve any tenants except those who, by medical definitions, could be described as belonging to the category of individuals with disabilities whom the sponsors agreed to serve.

The segregative aspects of this policy, which was never published in the Federal Register and for which no public comment was ever sought, became clear in ***Brecker v. Queens B'Nai Brith Housing***.[29] ***Queens B'Nai Brith*** was a Section 202 housing project for the elderly and those with handicaps. However, the project managers were willing to accept only tenants with mobility impairments. Thus, when two men with mild mental retardation applied for apartments, B'Nai Brith rejected their applications on the grounds that they did not belong to either the elderly or the mobility impaired categories, and therefore did not qualify for the housing.

The Court adopted HUD's reasoning, that the needs of individuals in the different categories differed substantially, and differed regardless of the actual needs of any one member of any of the categories. B'Nai Brith argued that the only services it provided were those of a social worker who arranged transportation for residents and assisted them with other minor services to enhance the quality of their lives.

The plaintiffs argued that those were the only services that they, too, needed, and that they could obtain other needed assistance from community programs. The District Court Judge decided that if the plaintiffs really needed such insignificant services then, by definition, they could not be developmentally disabled. If they were truly developmentally disabled, then they needed many more services than B'Nai Brith was capable of providing. Thus, HUD's superficial interpretation of Section 202 led this court, and others[30] to conclude that individuals with disabilities could be denied housing for discriminatory reasons deduced from administratively convenient categorical generalizations--the precise result that Section 504 sought to eradicate. It was a result the Section 202 statute was not intended to promote.

The only Congressional report to directly address HUD's policy of allowing sponsors to exclude persons with disabilities from 202 buildings, stated that

> [S]uch a policy is contrary to the purposes of Section 202. Like the Housing Act, Section 504 seeks the integration of persons with disabilities in every type of housing financed in whole or in part by federal funds . . . Particularly in the case of Section 202 housing specifically financed to house the elderly, no sponsor should exclude from occupancy a physically or mentally handicapped, developmentally disabled person who is capable of living in the project without requiring the sponsor to provide additional services specifically for such person.[31]

C. The Fair Housing Amendments Act of 1988

Amendments to expand the coverage of the Fair Housing Act of 1968 to individuals with disabilities were first introduced in 1979.[32] The amendments were reintroduced in every Congress until they were finally enacted by the 100th Congress in August 1988, and signed by the president in September. HUD played very little role in these amendments, much less a leadership role. When witnesses from HUD testified about the bill, they focused on its enforcement aspects.[33] When the General Counsel was asked about the new coverage for persons with disabilities, he answered by raising questions about a different amendment.[34]

The administration Bill, S. 2146, was introduced on March 6, 1986 by Senator Dole "by request" of the administration. With regard to the coverage of individuals with disabilities, it did prohibit discrimination on the basis of handicap, and it did require property owners to make "reasonable and necessary accommodations in policies, practices, rules, services, or facilities."[35]

However, the bill did not require the property owner to incur any expense on behalf of a tenant, even if the expense was related to changing a discriminatory policy. Further, the bill established an "unreasonable inconvenience to affected persons" standard by which any changes in structures or policies were to be judged. The standard was so vague and so subjective, that if a nondisabled tenant complained that parking spaces reserved for tenants with mobility impairments "unreasonably inconvenienced" him, neither the landlord nor the user of the reserved space could rely on the administration's bill to support the accommodation.

When the Fair Housing Amendments Act came close to passage, HUD's primary concern became its increased workload under the new construction provision of the bill. The bill required all new, multifamily housing to be designed and constructed according to four specific adaptability criteria, which were delineated in the bill. HUD's concern was not that the criteria were too few, that the bill would not resolve many accessibility problems for people with disabilities, but that Congress might expect it to review every blueprint for every new multifamily dwelling built after the effective date of the Act. When HUD's concern was allayed by various members of Congress, HUD raised no other issues.

IV. Failures In Enforcement

A. Section 504 of the Rehabilitation Act

The absence of Section 504 regulations resulted in HUD's performing *no* compliance reviews from 1973, when Section 504 was enacted, until June 1988. HUD officials were reticent about even responding to complaints until the court in *Paralyzed Veterans of America v. William French Smith*[36], in 1982, required that they do so. The litigation had been filed against all federal agencies that had failed to promulgate Section 504 regulations. The June 1981 court order required HUD and all of the other defendant-agencies to advise all grant recipients that Section 504 requirements applied to the funds they received. The Court also ordered the agencies to publish a notice in the Federal Register advising HUD recipients of the same information, and to tell them to refer to HEW's 1977 regulations for guidance on Section 504 questions.[37]

One of the most alarming indications of how HUD has been avoiding its responsibility to enforce Section 504 has been its refusal to spend and allocate funds for enforcement activities.

At the request of HUD's Fair Housing and Equal Opportunity Office (FHEO), which was responsible for enforcing Section 504, the General Counsel asked the Department of Justice for its opinion as to whether HUD was authorized to enforce Section 504 through compliance reviews without agency regulations. On February 5, 1987, the Department of Justice advised HUD that it had both the authority and the responsibility to enforce Section 504. HUD then sent an Interim Section 504 Compliance Review Manual to the Department of Justice for its approval. Since the General Counsel's Office would not permit FHEO to begin compliance reviews before Justice approved the Manual, a quick approval was hoped for. Unfortunately, the Department of Justice sent its approval one day after HUD published its final Section 504 regulations on June 3, 1988.

One of the most alarming indications of how HUD has been avoiding its responsibility to enforce Section 504 has been its refusal to spend and allocate funds for enforcement activities. In 1980, during the last year of the Carter administration, Congress appropriated, and the president approved, the award of $3 million dollars to HUD for the enforcement of Section 504 and related independent living activities. When the Republicans took control of HUD, they returned the money to the Treasury.

In 1982, Congress appropriated $900,000 for the same activities. HUD returned all but $9,000 to the Treasury. John Putnam, the HUD official responsible for the funds, decided that more could be accomplished on behalf of individuals with disabilities through the production of a film, starring Kermit the Frog and Miss Piggy, and shown on the Christian Broadcasting Network, than could be accomplished through the enforcement of Section 504. Putnam's plan was also cheaper. The film was not made and Putnam left HUD before the second Reagan administration began.

Until 1984, enforcement of Section 504 was the responsibility of the Office of Independent Living. In 1984 the enforcement charge was transferred to FHEO, which already had responsibility for enforcement of the Fair Housing Act of 1968. From 1984 through 1987, FHEO received an annual budget of $100,000 to enforce Section 504. Its budget for 1988 and 1989 has been raised to $200,000. FHEO had to stretch that money to cover internal Section 504 training, training and technical assistance to HUD recipients, advertisements, policy development, an internal Section 504 self-assessment, and management training.

While FHEO staff has not been cut in the past eight years, neither has the size of its Section 504 staff increased. Prior to 1988, only two professionals worked on Section 504 issues in headquarters, and one half-time professional slot was allocated to each region. In 1988, headquarters and regional staff doubled. It remains to be seen whether FHEO's requests for realistically-sized staffs and budgets, necessary for the enforcement of the Section 504 regulations and the Fair Housing Amendments Act, will be approved.

The number of Section 504 complaints received by HUD has risen from approximately 75 in 1980 to more than 240 in fiscal year 1988. There is every reason to believe that the issuance of regulations will result in a skyrocketing number of complaints filed with HUD. Of the complaints that HUD has received in the past eight years, many have taken two to three years to resolve. However, most of them have also been settled in favor of the complainant. The two primary issues raised by the complaints have been lack of physical accessibility, and misinterpretation of the phrases "otherwise qualified" and "capable of independent living." In the latter cases, providers have assumed that applicants for housing are incapable of living independently because of their disabilities and therefore have denied them housing because they were not "otherwise qualified" for the housing program. FHEO has consistently and successfully demonstrated to these providers that individual assessments of the applicant's abilities and needs reveals the capacity to live independently.

The one complaint that FHEO has not been able to resolve concerns a housing provider's eviction of a tenant whom he believed to have AIDS.[38] While FHEO found the provider out of compliance with Section 504, the General Counsel's Office refused to approve the letter of noncompliance. Instead, that office referred the case to the Department of Justice for its review in March 1988. The Department of Justice has not yet responded to HUD's inquiry.

B. Applicability of the Architectural Barriers Act to the Community Development Block Grant Program

Late in the Carter administration, HUD requested an opinion from the Department of Justice as to whether the Architectural Barriers Act[39] applied to the Community Development Block Grant Programs (CDBG) of Title I of the Housing and Community Development Act of 1974[40] The request was significant, because HUD distributed millions of dollars to communities around the country for a variety of purposes. If the Architectural Barriers Act were to apply, all of the structures built or rehabilitated with CDBG funds would have to be accessible to individuals with disabilities. CDBG funds have been used for park improvements, construction of centers for those who have disabilities, and sheltered workshops, vocational training centers, recreational facilities and equipment, day care centers, senior centers, and as local matching funds for other Federal grants.[41]

In a May 8, 1980 Memo from the Office of Legal Counsel to Drew Days, III, Assistant Attorney General, Civil Rights Division, the Department agreed with the Architectural and Transportation Barriers Compliance Board (ATBCB) and GSA that the Architectural Barriers Act did apply to

CDBG programs. In spite of that opinion, HUD amended its CDBG regulations, on September 23, 1983, to delete the requirement that all buildings which were designed, constructed, or altered with CDBG funds had to comply with accessibility standards.[42]

HUD amended the regulation without complying with the Administrative Procedures Act public notice and comment requirement. HUD's justification for not doing so was that the Department had not been legally required to impose accessibility requirements on CDBG funds, that it had done so as a matter of administrative discretion, and therefore it could delete the requirement as a matter of administrative discretion. HUD further explained that removing the requirement was consistent with the Congress's mandate under the Omnibus Budget Reconciliation Act of 1981 that the Federal Government reduce federal involvement and requirements with respect to the manner in which a locality spent CDBG funds.[43]

The ATBCB objected to HUD's deletion of the requirement and of its avoidance of Administrative Procedure Act requirements in doing so. In addition, the FHEO of HUD agreed with the ATBCB, and pressed HUD's Office of General Counsel to reconsider the coverage of the Architectural Barriers Act. Finally, on June 8, 1988, the ATBCB requested an opinion from the Department of Justice once again on the same question that the Department had answered eight years before: whether the Architectural Barriers Act applied to CDBG funds.

While the Department of Justice has not yet responded, CDBG funds continue to build and rehabilitate buildings that could, but for HUD's narrow and incorrect interpretation of the law, be designed in accordance with the needs of people with disabilities. Ironically, because the CDBG statute and regulations[44] specifically reference Section 504, HUD's new Section 504 regulations now impose accessibility requirements on CDBG funds. However, the Section 504 regulations do not require that every building in a particular program be physically accessible since the regulations permit a balancing of reasonable accommodation and costs. The Architectural Barriers Act, on the other hand, would require each building to be accessible.

V. Emerging Issues and Challenges

As the above discussion makes clear, HUD's commitment to enforcing the laws designed to promote equal opportunity for individuals with disabilities has been weak. The promulgation of Section 504 regulations and the enactment of the Fair Housing Amendments Act of 1988 impose new and clear responsibilities on HUD. HUD should no longer be able to maintain its unblemished record of never having referred a single disability discrimination case to the Department of Justice, or to an administrative hearing

A new administration at HUD will have to justify and, it is hoped, alter HUD's catergorical and discriminatory approach to providing program services to people with disabilities. It should focus on providing housing to all applicants in the least restrictive settings possible, and on the creation of low-income housing that does not separate tenants with disabilities from their neighbors. Both the Section 504 regulations and the Fair Housing Amendments Act support a decisive and immediate shift in HUD's policies in that direction.

VI. Recommendations

1. Design and staff the FHEO office in such a way as to maximize HUD's resources in enforcing the Section 504 regulations and the Fair Housing Amendments Act.

2. Establish a publicity campaign, combined with an energetic and adequately funded technical assistance program, to educate housing providers, recipients and the general public as to the mandates and philosophies of Section 504 and the Fair Housing Amendments Act of 1988.

3. Amend all HUD program regulations to conform to the mandates of all of the civil rights statutes.

4. Amend the CDBG regulations to clarify, specifically, that the Architectural Barriers Act applies to CDBG funds.

5. Withdraw and replace the Abrams and Barksdale memoranda with policy statements that reinforce the rights of people with disabilities to be treated as individuals, and not as unidentifiable numbers making up generalized categories of people.

6. Develop policies and programs to assist developers in establishing a wide variety of community residence for people with disabilities in need of structured housing, and identify and support integrated housing for all people with disabilities.

7. Request and fight for adequate funding for the development of low-income housing and modernization funds to address the housing needs of those who must otherwise live separated from their families in institutions, nursing homes, hospitals, and on the street.

CHAPTER XXIX

EMPLOYMENT RIGHTS FOR THE DISABLED: AN OVERVIEW OF REAGAN ADMINISTRATION ACTIVITIES

by Stanley A. Freeman

I. Introduction

For individuals with disabilities, as for most other Americans, a major prerequisite to economic self-sufficiency is a job. Employment is an essential key to successful adult integration into community life. Various forms of work are associated with greater independence, productivity, social status, and financial security. Success and quality of life are often measured in terms of paid employment.[1]

Currently, no comprehensive equal employment opportunity statute for persons with disabilities exists.[2] While some other statutes--The Rehabilitation Act of 1973, as amended, The Handicapped Children's Protection Act of 1986, and The Protection and Advocacy for the Mentally Ill Individuals Act of 1986--have incorporated some significant but narrow equal opportunity provisions,[3] handicapped Americans are still treated as second class workers.

This paper reviews some of the more important aspects of the Reagan administration's enforcement of civil rights policies affecting persons with disabilities. The review will focus upon four fundamental areas: (1) the extent to which the government has fulfilled its role as "model employer of handicapped persons"; (2) the Administration's enforcement of existing statutory rights; (3) the status of key legal and administrative issues affecting the employment rights of the disabled; and (4) how Social Security Disability Insurance creates work disincentives for disabled persons.

II. The Federal Government as "Model Employer of the Handicapped"

Section 501 of the Rehabilitation Act of 1973 was enacted "to require that the federal government act as the model employer of the handicapped and take affirmative action to hire and promote the disabled."[4] The Act directs all federal government agencies to develop and implement affirmative action plans for the hiring, placement, and advancement of handicapped individuals. Regulations implementing the Act[5] recognize the obligation of the government to become a model employer.

An assessment of the Reagan administration's fulfillment of this obligation must focus on federal agencies' record of hiring disabled persons, as well as the government's policies with respect to employment practices that have an adverse effect upon disabled persons.

A. Affirmative Action Accomplishment Reports

Since 1979, the Equal Employment Opportunity Commission (EEOC) has estimated that persons with "targeted disabilities"[6] who are work force age and able to work constitute 5.95 percent of the entire work force population. Consistent with its reluctance to require numerical goals or quotas in the context of affirmative action programs, the Reagan EEOC stated that "if census data are used to compute agency objectives, the [5.95] percentage is recommended. It is not required that the agency adopt the 5.95 percent figure as its objective for the program year."[7]

While the administration tacitly acknowledges 5.95 percent to constitute a reasonable benchmark, statistics show that the government's performance in reaching that level has been less than successful. The percentage of persons with targeted disabilities employed by the federal government during the Reagan years is described in Table 1.

Table 1

1981[8]	1982	1983	1984	10/86	09/87
.80%	.82%	.89%	.96%	1.05%	1.09%

Although these figures represent modest yearly increases, they also demonstrate a significant failure of affirmative action when measured against the 5.95 percent benchmark figure. In 1984 the EEOC conceded that "handicapped individuals, particularly those with targeted disabilities, continue to be underrepresented in the federal work force."[9] Unfortunately, little progress has been made since that time.

Employment of persons with targeted handicaps by the larger federal agencies has also lagged far behind the recommended 5.95 percent figure. On average, these larger federal agencies hired fewer targeted handicapped persons than did the government generally. See Table 2.

For handicapped workers, generally (*i.e.* not limited to persons with targeted disabilities), the numbers are substantially higher. See Table 3. These figures support the conclusion to be drawn from the targeted disabilities statistics--significant increases have not been achieved, only three-fourths of a percent in six years. The data, however, is far less significant. These figures include all employed individuals suffering from a broad range of physical impairments which extend far beyond the scope of targeted disabilities. They should be compared with estimates of the role of prevalence of such conditions in the working age population--13.3 percent, according to 1980 census data and 15 percent, according to a 1986 Harris poll.

The overall failure of the federal government to approach or meet its own goals with respect to employment of the handicapped reflects a profound lack of adequate and effective review and oversight by the EEOC. The EEOC is charged with the responsibility of scrutinizing the hiring goals of each agency and the implementation of those goals. The admitted underrepresentation of handicapped persons within the Reagan-era federal workforce must be tied directly to underutilization of the capacities of this watchdog agency.

B. Blanket Policies Prohibiting Employment of the Disabled

Consistent with its lack of progress in the federal hiring of the people with disabilities, the Reagan administration has retained and adhered to blanket prohibitions which preclude entire categories of disabled persons from being considered for employment. Illustrative cases include *Davis v. Meese,*[12] where insulin dependent diabetics were excluded from becoming FBI special agents and *Local 1812, American Federation of Government Workers v. Dept. of State,*[13] where persons infected with AIDS were excluded from State Department foreign service positions. In each of these cases, the Reagan administration fought successfully to retain wholesale exclusions eliminating entire groups of disabled persons from consideration for particular job categories.

In *Davis v. Meese,* the administration was confronted with substantial medical and policy reasons in favor of creating a narrowly defined exception as an alternative to the outright prohibition against the employment of persons using insulin as FBI special agents. Instead, the agency adopted a litigation strategy aimed at attaining a broad judicial ruling ratifying the all-encompassing prohibition against hiring diabetic FBI agents.

In spite of the Supreme Court's holding in *School Board of Nassau County, Florida v. Arline,*[14] supporting individualized determinations, the administration has continued to use blanket federal prohibitions against the hiring of classes of disabled workers. For example, the Department of Transportation continues to prohibit the medical certification of any applicant for an interstate trucker's license where the individual has an established medical history, or clinical diagnosis, of either diabetes (requiring insulin) or epilepsy.[15] The diabetes prohibition remains unchanged, despite a 1986 petition for rulemaking by the American Diabetes Association citing medical developments warranting the promulgation of rules providing for certification on an individual case-by-case basis. The administration has yet to respond to the petition.

Another such blanket prohibition is the Federal Aviation Administration's outright ban against the licensure of pilots where the applicant has a history of insulin usage.[16] The FAA has steadfastly refused to consider any individualized reviews, relying instead upon a conclusive presumption based strictly upon insulin usage. Affected parties have argued without success that, in view of advancements in medical science, the insulin factor alone is an improper and inadequate basis for disqualification.

Table 2

Justice	.42% [10]
Transportation	.42%
Agriculture	.68%
NASA	.77%
Interior	.84%
U.S. Postal Service	.96%
Labor	1.01%
Defense	1.14%
HUD	1.25%
HHS	1.33%
Treasury	1.56%
Veterans	1.68%
Average	1.01%

Table 3

1981[11]	1982	1983	1984	1986	1987
5.02%	4.97%	5.14%	5.45%	5.63%	5.77%

The failure to alter conclusive presumptions in federal law which deny individual job applicants the right to an individualized determination, as is their right under the Rehabilitation Act, is directly at odds with the concept of the government as enforcer of equal employment guarantees. The administration's record of litigating cases in favor of such prohibitions and its failure to revisit such criteria for review in light of scientific advancements cannot be reconciled with the intent and objectives of the Act. The prohibitions have, in effect, made government part of the problem rather than the solution.

II. The Reagan Administration's Enforcement Record Under the Rehabilitation Act

A. Section 503

Section 503 of the Rehabilitation Act requires that federal government contracts include provisions requiring affirmative action. Contractors must "employ and advance in employment qualified handicapped individuals."[17] The section further provides that individual victims of handicapped discrimination may file an administrative complaint with the United States Department of Labor Office of Federal Contract Compliance Programs (OFCCP) to seek redress by means of government intervention. A majority of courts have held that this administrative remedy is the sole recourse available to victims of handicapped discrimination by federal contractors. Unlike employees who work directly for the federal government or its grantees, no private right of legal action is available to this category of employees.[18] The federal government is the sole arbiter and enforcer of these claims.

Statistics indicate that in the last eight years there has been a broad-based decline in enforcement of federal contract employees' rights under Section 503.[19] See Table 4.

1. Decline in the Number of Complaints Filed

Although a leveling off, or gradual decline in complaint volume arguably reflects a reduced incidence of discrimination, it defies logic to suggest that an eight year decline in excess of 70 percent was caused by the near disappearance of handicapped discrimination in the workplace. Diminished pressure upon employers to affirmatively disclose information concerning complaint procedures, or diminished contact between OFCCP staff and affected employees may be better explanations for these curious numbers. A widespread conviction in the disability com-

Table 4

	1980	1981	1982	1983	1984	1985	1986	1987	1988*
Number of Complaints filed	2500	2703	1418	1516	1384	1341	1461	967	704
Complaints sent to area Office for Investigation	1426	1636	905	883	768	631	736	671	672
Compaints Completed	1293	1502	1845	1648	883	721	815	836	583
No Violations Found	959	1113	1523	1308	780	672	764	677	493
Violations Found	334	389	322	340	103	49	51	159	90
Conciliation Agreement	n/a	68	45	21	12	6	13	13	3
Letters of Commitment & Settlement Agreements	n/a	28	3912	17	27	15	20	68	48
Administrative Requests to Office of the Solicitor	n/a	88	12	18	24	14	9	78	39
Letters Confirming Contractor Complainant Agreement	n/a	n/a	n/a	n/a	n/a	14	9	0	0

*Through third quarter

munity is that the filing of a Section 503 complaint is a time-consuming, lengthy, cumbersome process that rarely concludes successfully. Reduced filing of complaints can be seen, therefore, less as evidence of nondiscrimination than as a lack of confidence in Department of Labor enforcement.

2. Lack of Successful Resolutions Where Violations Found

The number of cases resulting in findings of violations greatly exceed the combined data for successful completion of conciliation agreements (*i.e.*, between the employee and the federal contractor) and settlement agreements. In the vast majority of cases, consequently, there was no successful resolution achieved between the discriminating company and the affected employee.

For example, in 1982, OFCCP found violations in 332 cases, but only 45 conciliation agreements, 39 letters of commitment and settlement agreements and 12 referrals to the Solicitor resulted. Since individual victims of acknowledged discrimination have no other recourse but to rely upon the OFCCP for relief, serious questions are raised as to the adequacy and effectiveness of OFCCP's efforts to negotiate successful conciliation agreements on behalf of those individuals.

B. Section 504

Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap in the workplace and programs by federal agencies and recipients of federal funds. The courts have uniformly ruled that individual victims of discrimination are entitled to maintain private enforcement actions under this section.[20] The administration, however, has contested this right.

The Departments of Transportation and Justice argued that a deaf individual had no private right of action to challenge federal regulations precluding his employment as a tractor-trailer driver. In *Cousins v. Sec'y., Dept. of Transportation,*[21] an initial panel ruling of the First Circuit Court of Appeals resoundingly rejected this argument. The court held that "allowing individuals the opportunity to sue directly under section 504, not just when a recipient allegedly discriminates, but also when the federal government itself allegedly discriminates by issuing safety regulations which preclude the employment of the handicapped, is not only sensible but is also fully consistent with...orderly enforcement of the [Rehabilitation Act]."[22]

III. Role of the EEOC and the Regulations Implementing Section 501

A. Lack of Meaningful EEOC Enforcement Activity

Section 501 establishes the EEOC's role as arbiter of individual cases and interpretive issues affecting employment of the handicapped. Thus it provides the Commission an opportunity to guide other federal agencies in determining the scope and application of critical terms such as "qualified handicapped person" and "reasonable accommodation."

The EEOC has at its disposal an assortment of administrative tools by which rulings and policies, once established, can be enforced and implemented. Section 501 directs the EEOC to review each agency's hiring practices and to provide annual reports to Congress.[23] Moreover, by Executive Order, the EEOC is charged with the responsibility:

> to provide leadership and cooperation to the efforts of Federal departments and agencies to enforce all Federal statutes, executive orders, regulations and policies which require equal employment opportunity without regard to race . . . or handicap.[24]

This Executive Order further directs the EEOC to develop uniform standards defining illegal employment practices and directs the agency to issue appropriate implementing regulations. Similarly, the EEOC's parallel enforcement authority under § 717 of the Civil Rights Act of 1964[25] includes the authority to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities. . . ."

Thus, the EEOC has broad authority to initiate administrative proceedings in the form of rulemaking, agency orders, compliance reviews, and oversight activities, and to thereby implement the policies which are established in individual cases. Unfortunately, during the Reagan years, the agency has failed to invoke this enforcement authority.

Ignacio v. U.S. Postal Service illustrates the absence of adequate coordinating and implementing activity by the EEOC, and the resulting lack of consistent nondiscriminatory employment practices throughout the federal government. In *Ignacio*, the EEOC interpreted its Section 501 regulations to include reassignment as a method of reasonable accommodation. The decision was subsequently affirmed by the "Special Panel," a hybrid of the EEOC and the Merit Systems Protection Board.[26]

Unfortunately, no follow up was initiated to ensure that the EEOC ruling in *Ignacio* became part of standard federal personnel practice. Thus, the application of reassignment as a method of reasonable accommodation has largely remained inconsistent and uncertain. In a number of instances, moreover, federal agencies have opposed reassignment in litigation as being an unreasonable accommodation.[27]

B. Need to Update Section 501 Regulations

The EEOC's Section 501 regulations[28] were promulgated in 1978. In the interim, a vast number of judicial and administrative pronouncements concerning the proper application of the Rehabilitation Act have supplemented and superceded the original rules. Thus, the regulations are in significant need of updating and clarification. Perhaps the foremost need for clarification is found in regulations determining the definition and scope of reasonable accommodations.[29] These regulations provide insufficient guidance to federal agencies regarding what processes and procedures should be in place to ensure that each affected employee receives fair and consistent access to reasonable accommodations.

A second regulatory area requiring revision is that addressing the legality of employment and selection criteria.[30] The regulations fail to clearly restrict the use of blanket exclusionary criteria, and fail to guarantee full individualized consideration of job applications submitted by handicapped persons.

IV. Social Security Disability Insurance and Work Disincentives Affecting Persons with Disabilities

While not a civil rights program per se, the federal government's system of cash benefits for disabled persons contains powerful work disincentives having a significant adverse impact upon disabled persons who wish to work but are unable to risk the loss of benefits. The effect of these work disincentives upon the employment rights and opportunities of disabled persons is profound.

Social Security Disability Insurance (DI), as authorized by Title II of the Social Security Act, and Supplemental Security Income (SSI) provides benefits to persons who are incapable of gainful employment. To qualify for benefits, applicants must successfully complete a lengthy and cumbersome application process.[31] Once awarded benefits, the beneficiary is told that regular and substantial earnings will cause payments to be suspended and terminated.

In February, 1988, the Disability Advisory Council reported that "people with disabilities have the same rights and obligations with respect to work as the nondisabled" and that "programs serving people with disabilities, including programs of cash and medical assistance, should encourage work." The Council concluded that the DI and SSI programs, by removing persons from the rolls "if their medical conditions improve or if they engage in substantial work," discourage beneficiaries from working and defeat the fundamental objective of enabling disabled persons to be rehabilitated and employed.[32]

The Council acknowledged that the issue of how to encourage DI and SSI beneficiaries to work "has been debated for years."[33] Nonetheless, there has been no significant progress achieved during the Reagan years. Work incentive legislation encouraging employment by lengthening the extended period of eligibility[34] was enacted over the objections of the Social Security Administration.

In short, the current DI and SSI programs present a stark choice between security in the form of cash benefits, and personal well-being in the form of employment. Employment disincentives dissuade hundreds of thousands of disabled Americans from working. These built-in employment obstacles are counterproductive and should be eliminated. DI and SSI programs were intended to create opportunities for disabled persons, not reduce them.

V. EMERGING ISSUES

A major upcoming issue regarding employment rights of persons with disabilities concerns the expansion of nondiscrimination requirements to the private sector. Current statutes prohibiting employment discrimination on the basis of handicap apply only to programs and activities conducted by federal agencies, federal contractors, and recipients of federal financial assistance. There is no broad prohibition of discrimination against persons with disabilities comparable to Title VII of the Civil Rights Act of 1964, which applies to all employers engaged in an industry affecting commerce who have fifteen or more employees, to employment agencies, to employment training programs, and to labor unions.

For some time, disability organizations have called for private sector coverage of handicap discrimination laws. Recently, such calls have begun to generate increasing enthusiasm and concreteness. The proposed Americans with Disabilities Act currently pending in Congress would greatly expand the scope of nondiscrimination protection available to persons with disabilities. In addition to expanding the scope of such civil rights protection in a variety of other areas, including public accomodations, transportation, and communications, the legislation would prohibit employment discrimination on the basis of handicap by all persons and agencies currently covered by Title VII of the Civil Rights Act.

VII. Recommendations

1. The Federal Government should institute serious and ongoing outreach and recruitment initiatives to substantially increase the proportion of individuals with disabilities in the Federal workforce at all levels.

Agencies' performances should be closely monitored, and those lagging behind in the hiring, placement, and advancement of persons with disabilities should be penalized. EEOC's role should be clarified to give it explicit authority for establishing and enforcing regulations to require outreach and recruitment activities. Federal agencies should be compelled not merely to submit affirmative action plans under Section 501, but to *implement* such plans.

2. The new Administration should support and promote expansion of nondiscrimination protections for persons with disabilities to private sector employment by endorsing and pushing for the enactment of the Americans with Disabilities Act.

During the 1988 Campaign, George Bush expressly endorsed both the concept of nondiscrimination protection in private employment and the vehicle of the American with Disabilities Act for expanding civil rights protection for persons with disabilities. The task now is to follow through on these promises and to put the Administration's muscle behind the legislation.

3. Federal policies, procedures, or regulations that impose or sanction blanket exclusions of classes of persons with disabilities from employment, licensure, certification, or other opportunities, should be closely scrutinized and, unless they are necessary and substantially related to essential components of the job or activity in question, they should be eliminated.

Existing exclusionary standards, such as those against persons with diabetes in the FBI and against persons with any history of seizures or diabetes or with an amputated arm seeking federal truckdriving licenses, are often overly broad and unnecessary. Such restrictions should be reviewed to see if they can be eliminated or their aims accomplished by more carefully tailored standards applied on an individualized basis.

4. Individuals with disabilities alleging discrimination by a Federal contractor should be afforded a private right of action, and OFCCP procedures and policies should be fundamentally revised to promote vigorous enforcement of the requirements of Section 503.

5. In accordance with the great weight of judicial precedent, the Administration should accept and foster the principle that individuals alleging denial of their rights under Section 504 and other disability rights statutes are entitled to assert their rights through a private right of action.

6. EEOC should be given clear authority to establish and enforce standards implementing the prohibitions of discrimination on the basis of handicap in Section 504 and other civil rights laws protecting persons with disabilities.

7. EEOC should revise and repromulgate Section 501 regulations to clarify and strengthen the protections and rights available to employees and job applicants with disabilities.

Requirements of eliminating barriers, making individualized reasonable accomodations, and eliminating discriminatory exclusionary criteria should be more clearly defined and delineated.

8. SSI and DI programs should be restructured to eliminate disincentives to employment for persons with disabilities.

The National Council on the Handicapped in its 1986 report *Toward Independence,* outlined several specific approaches for eliminating such employment disincentives. The new administration, working through the Social Security Administration and with Congress, should promote the achievement of the Council's recommendations to assure that our Nation's Social Security laws do not hamper persons with disabilities in their search for gainful and meaningful employment.

CHAPTER XXX

CIVIL RIGHTS AND PERSONS WITH DISABILITIES: THE DEPARTMENT OF TRANSPORTATION

by David Chavkin

I. Definition of Problem/ Evidence of Discrimination

Access to transportation is essential if persons with disabilities are going to have equal opportunities for self support and independent living. Access to transportation is necessary to get to and from work, stores, medical facilities, recreational and social settings and other destinations. It encompasses the ability to move about the local neighborhood, the city, the state, and the world.

Approximately 7.4 million persons have disabilities that affect their access to transportation services.[1] Transportation handicaps vary, ranging from difficulty climbing stairs, reading signs, hearing announcements, or understanding transit information, to the use of a wheelchair. On the average, persons with disabilities have lower incomes than other Americans and are therefore more dependent on public transportation to conduct the business of their daily lives.

In fact, a major impediment to employment for people with disabilities is their inability to reach the job site. Increasing job opportunities through improved access to transportation would bring far-reaching economic benefits to disabled individuals and to society.

The National Council on the Handicapped reviewed implementation of the Nation's transportation policy and concluded that we are far short of a truly accessible system.[2] A 1982 survey conducted by the General Accounting Office indicated nearly three-fourths of urban rail stations surveyed are almost totally inaccessible to wheelchair users.[3] The same study determined that one-third of the transit systems offering fixed-route bus service did not have a single bus with a lift. A 1985 American Public Transit Association (APTA) fact sheet reported that 76% of the 49,000 buses then in use in this country were not accessible.[4]

Persons with disabilities encounter a variety of additional problems when attempting to use other forms of transportation. Air travelers who use wheelchairs face a multitude of problems, ranging from uncomfortable, dangerous, and dehumanizing boarding procedures to inaccessible restrooms and boarding areas. Intercity/interstate bus service, the primary mode of public transportation for people in rural areas, is almost totally inaccessible to many persons with transportation handicaps. Modified private vehicles, frequently the only source of transportation realistically available to many persons with severe disabilities, are often prohibitively expensive for individuals and families with limited incomes.

Many of these barriers could have been eliminated by the Department of Transportation through its administration of public transportation programs. Many visible barriers have remained as a result of inaction by the Department. Technology in the transportation field has advanced to a point where accessibility is feasible and realistically achievable. Today it is not technological limitations that require a person using crutches to have to negotiate steps leading up to a boarding ramp at an airport nor is it an absence of technology that requires a bus that stops at a bus stop to drive off leaving a person who uses a wheelchair still sitting there because the bus is not wheelchair-accessible.

These visible barriers have persisted because the Department of Transportation has chosen to elevate cost considerations over access. As a result, these visible barriers to access continue to interfere with the integration of persons with disabilities into employment and into other aspects of everyday life.

Moreover, these visible barriers are not the only forms of discrimination that remain to be rectified. Even where cost is not a critical issue, the Department of Transportation has chosen to tolerate invisible barriers that frustrate opportunities for persons with disabilities.

When a person with cerebral palsy is refused transportation by air carrier personnel, we are confronted with an intentional act of discrimination based on ignorance, myth, and hysteria. Similarly, when a commercial truck driver with epilepsy or with diabetes loses a job that he or she has performed flawlessly for years because of the application of an inflexible federal standard, we are again confronted with the present effects of discrimination based on ignorance, myth, and hysteria. These invisible barriers to access interfere just as significantly with the integration of persons with disabilities into employment and into other aspects of everyday life.

Over the past eight years the Reagan Administration has barely grappled with the human costs attributable to the continued existence of these barriers. Moreover, in the few instances in which major policy decisions have been made, the Administration has chosen to give unenlightened priority to economic costs over human costs and to considerations of burdens on businesses instead of burdens on human dignity. The equations represented by those policy decisions represent the problems that must be brought into proper balance during the next Administration.

II. Statement of Governing Laws

A. Department of Transportation

The Department of Transportation was created in 1966.[5] Among the major operating components of the Department are the Federal Railroad Administration,[6] the Federal Highway Administration,[7] the Federal Aviation Administration,[8] and the Urban Mass Transportation Administration.[9] Major civil rights issues affecting persons with disabilities exist in all of these Administrations.

Civil rights issues are the special responsibility of an Office of Civil Rights in the Office of the Secretary. Offices of Civil Rights also exist within the major Administrations.

B. Major Programs

1. Federal Highway Administration (FHWA)

Among the statutory responsibilities of the Federal Highway Administration is administration of the Motor Carrier Safety Act of 1984.[10] This Act was designed to improve highway safety with regard to commercial motor vehicles.

The Act applies to commercial motor vehicles in interstate commerce. This includes vehicles travelling from state to state as well as vehicles operating within a state shipping items that originated outside the state. In addition, federal highway safety regulations issued pursuant to the Act will preempt less stringent state laws governing regulation of commercial motor vehicles in intrastate commerce beginning on November 1, 1989.[11]

As discussed later in this chapter, these FHWA regulations have a large discriminatory impact on certain persons with disabilities.

2. Urban Mass Transportation Administration (UMTA)

The Urban Mass Transportation Administration administers a program of federal financial assistance in the form of grants and loans to assist in the development of mass transportation systems. One section of the National Mass Transportation Act of 1974 provides that transit systems need not charge fares to elderly and handicapped persons.[12] However, far more important are the provisions of the Urban Mass Transportation Act designed to increase access to mass transportation facilities for elderly and handicapped persons.

That Act also authorizes a set aside of 3.5 percent of annual appropriations to be used exclusively to finance programs and activities authorized to expand access for handicapped and elderly persons.[13]

3. Federal Aviation Administration (FAA)

The Federal Aviation Administration, formerly the Federal Aviation Authority, became a part of the Department of Transportation in 1967 as a result of the Department of Transportation Act. The FAA is charged with regulating air commerce to foster aviation safety, promoting civil aviation and a national system of airports, achieving efficient use of navigable airspace, and developing and operating a common system of air traffic control and air navigation for both civilian and military aircraft. Federal financial assistance is provided through the FAA to achieve these goals.

C. Civil Rights Statutes

The major civil rights statutes affecting persons with disabilities enforced by the Department of Transportation are sections 501 and 504 of the Rehabilitation Act of 1973, provisions of the Urban Mass Transportation Act, and the Air Carrier Access Act. The Rehabilitation Act is expressly directed at protecting the civil rights of persons with disabilities. The Urban Mass Transportation Act provisions promote the elimination of discrimination on the basis of handicap in the provision of mass transit services. The Air Carrier Access Act focuses on protecting the civil rights of persons with disabilities in the provision of air transportation services.

1. The Rehabilitation Act of 1973

Section 501 of the Rehabilitation Act[14] requires federal agencies to adopt affirmative action plans for the hiring, placement, and advancement in employment of persons with disabilities. The internal hiring practices of the Department are subject to the requirements of this section.

Section 504 of the Rehabilitation Act[15] prohibits discrimination on the basis of handicap by recipients of federal financial assistance against otherwise qualified handicapped persons. Section 504 was originally enacted in 1973.[16] 1978 amendments made a major expansion by covering for the first time programs or activities conducted by executive agencies. Prior to this amendment, activities of executive agencies were not subject to the same anti-discrimination requirements applied to recipients of federal assistance.

The Department first published its own section 504 regulations on May 31, 1979. These regulations established general requirements for programs operated by or funded by the Department. In addition, specific requirements were established for particular operating administrations such as the Federal Aviation Administration, Federal Railroad Administration, and Federal Highway Administration.[17] Specific program accessibility requirements were imposed[18] on mass transportation programs. As discussed later, these mass transportation regulations were challenged successfully in the courts, rescinded, and replaced by new regulations in 1986.

2. Urban Mass Transportation Act

The Urban Mass Transportation Act establishes[19] national policy that "elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this chapter) should contain provisions implementing this policy." As discussed later, the Reagan Administration expressly chose not to rely on this provision as a legal basis for expanding barrier-free access to mass transit services.

3. *Air Carrier Access Act*

In 1982, the Department adopted regulations implementing an extremely restrictive interpretation of the scope of section 504 as it applied to air carriers. In response to a Supreme Court decision upholding this interpretation, Congress enacted the Air Carrier Access Act in 1986.[20] The Act provides that, "There is recognized and declared to exist in behalf of any citizen of the United States as a public right of freedom of transit through the navigable airspace of the United States. In the furtherance of such right, the Board or the Secretary, as the case may be, shall consult with the Architectural and Transportation Barriers Compliance Board,[21] prior to issuing or amending any order, rule, regulation, or procedure that will have a signficant impact on the accessibility of commercial airports or commercial air transportation for handicapped persons."

The Air Carrier Access Act also prohibits discrimination against qualified handicapped individuals in air transportation. It provides that, "No air carrier may discriminate against any otherwise qualifed handicapped individual, by reason of such handicap, in the provision of air transportation."[22] "Handicapped individual" is defined to mean "any individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment."[23]

III. Developments In the Law

A. Coverage of Air Carriers

The now defunct Civil Aeronautics Board ("CAB") had issued proposed regulations in 1979 to implement section 504. When finally adopted in 1982, these regulations seriously restricted the scope of nondiscrimination safeguards. These final regulations limited the application of most specific section 504 implementation requirements only to subsidized carriers. Only the general requirements imposed by the Federal Aviation Act of 1958 mandating safe and adequate service for all persons, including those with disabilities, were applied to nonsubsidized carriers.

The Paralyzed Veterans of America and two other organizations representing persons with disabilities challenged this restrictive view of the scope of section 504. The Court of Appeals for the District of Columbia concluded that CAB's interpretation of the scope of its rulemaking authority under section 504 was inconsistent with congressional intent and controlling legal precedent. *Paralyzed Veterans of America v. C.A.B.*[24]

The Supreme Court reversed that decision and agreed with the narrow scope of DOT's regulatory jurisdiction under section 504. *U.S. Department of Transportation v. Paralyzed Veterans of America.*[25] The Supreme Court found that the Court of Appeals had interpreted the requirement that an entity be a recipient of federal financial assistance in an overly broad and unpersuasive manner. The Supreme Court refused to find that the the airlines had benefitted from federal financial assistance either in the federal assistance provided to airport operators that makes airlines feasible or in the federally-provided air traffic control system that makes air travel possible. The decision therefore sustained the narrow view of civil rights jurisdiction advanced by the Reagan Administration. That view was not to prevail for very long in the air travel context, however.

B. Implementation of the Air Carrier Access Act

Anderson v. US Air, Inc.,[26] involved a challenge to a commercial airline's rule excluding persons with severe vision impairments from emergency exit row seats. The federal district judge in the case held that there was adequate support for the airline's conclusion that the exclusion of blind passengers was safety-related and that its policy of excluding such persons from exit row seats was not violative of section 504 of the Rehabilitation Act.

Later that same year, Congress enacted the Air Carrier Access Act of 1986, amending the Federal Aviation Act and expressly prohibiting discrimination on the basis of handicap by air carriers in the provision of air transportation. In describing the Supreme Court decision in *Paralyzed Veterans of America v. C.A.B.*, one of the Senate sponsors, then majority leader Robert Dole, emphasized critically that the Court had found no federal financial assistance "despite the billions of federal assistance dollars devoted to our air transportation system through the Airport and Airway Improvement Act of 1970 and its successor legislation, and despite the fact the Federal Government directly operates the air navigation system."

Although the Act required the Department of Transportation to promulgate final regulations by January 31, 1987, final rules have not yet been issued. Instead, the Department undertook regulatory negotiation in advance of the issuance of proposed rules with representatives of disability groups and with air travel industry representatives. When the regulatory negotiation process failed to produce a consensus, a notice of proposed rulemaking was issued on June 22, 1988.

Although the comment period on the proposed rulemaking was due to close on September 20, 1988, an extension of this period was requested by members of both the disability civil rights community and the air travel industry for different reasons. Several disability groups requested an extension and remedial action because of the failure of the Department to comply with section 504 by failing to issue the notice of proposed rulemaking in an accessible format. The comment period was extended for 90 days in response to these requests.

While the rulemaking process has moved forward, the federal courts have begun to interpret the Act in the absence of regulations. One of the major questions has been the existence of a private right of action to enforce the Act against airlines that discriminate on the basis of handicap. In *Tallarico v. Trans World Airlines, Inc.*,[27] a private right of action was found on behalf of a young girl with cerebral palsy who was refused transportation.

C. Mass Transit Accessibility

The Urban Mass Transportation Administration's approach to access for persons with disabilities has two components. The first relates to programs financed under the special set-aside of funds.[28] The second, and more significant, relates to accessibility in programs financed generally by the Administration.

Regulations governing the first component were first published in 1976[29] and have remained unchanged since that date. The definition of "handicapped persons" under this Part includes only those persons who "are nonambulatory wheelchair-bound and those with semi-ambulatory capabilities, and are unable without special facilities or special planning or design to utilize mass transportation facilities and services as effectively as persons who are not so affected."[30]

Program requirements under this Part generally require fixed facilities to meet ANSI (American National Standards Institute, Inc.) standards for physically accessibility,[31] buses to be compatible with access by wheelchair,[32] and rapid and light rail vehicles to meet certain UMTA physical accessibility requirements.[33] The regulations require applicants for financial assistance to assure that rates charged elderly and handicapped persons during non-peak hours for transportation do not exceed one-half of the rates generally applicable to other persons at peak hours.[34]

With respect to the second component of the UMTA requirements, the Reagan Administration had to choose between a mainstream approach to mass transit that would provide barrier-free access or a dual-track system that would perpetuate existing discriminatory patterns. In 1986, the Administration opted for regulations embracing the latter approach.[35]

These regulations contain specific requirements for accessibility as well as minimal accommodation requirements which prohibit any mass transit system from excluding any handicapped person "if the handicapped person is capable of using that system."[36] This language echoes the definition of "otherwise qualified," applied in the decision in *American Public Transit Ass'n v. Lewis.*[37] Thus, if a person with a severe mobility impairment uses a wheelchair, the transit system cannot deprive him or her of the opportunity to walk up the steps of a bus if able to do so.

To the extent that transit authorities opt for specialized services for persons with disabilities, six "service criteria" are applicable under the 1986 DOT regulations. These criteria are as follows:

1. Anyone who, by reason of a disability, is physically unable to use the bus system for the general public must be treated as eligible for the service.
2. The service must operate during the same days and hours as the bus service for the general public.
3. The service must operate throughout the same geographic area as the bus service for the general public.
4. Fares for trips on the two services must be comparable.
5. Service must be provided within 24 hours of a request for it.
6. Transit providers may not impose restrictions or priorities based on trip purposes.

Under this approach, persons with substantial mobility impairments do not even get the opportunity to ride at the back of the bus. They have to ride on a segregated and programatically unequal system. However, this separate and unequal program was even further limited under the 1986 DOT regulations.

The key limitation imposed by the UMTA regulations is referred to as the "full performance level" or the "cost cap." Pursuant to those regulations, a system is not required to spend more than 3 percent of its total annual average operating costs "in order to comply with this subpart, even if, as a result, the recipient cannot provide service to handicapped persons that fully meets the service criteria specified . . . ."[38] The regulatory history of this provision is especially instructive.

The initial DOT guidelines in 1976 would have authorized communities to provide door-to-door "special services" rather than make fixed route transportation modes accessible. After President Ford issued Executive Order No. 11,914,[39] HEW issued government-wide guidelines to determine obligations of recipients of federal financial assistance under section 504. These regulations required that all recipients of federal funds "mainstream" handicapped persons. Persons with disabilities were to be integrated into the programs available to others rather than treated as a separate group in "special programs." Under these guidelines, "separate treatment" was to be provided only when necessary to ensure equal opportunities.

As noted by the Court of Appeals for the District of Columbia Circuit in *American Public Transit Ass'n v. Lewis*,[40] "In the context of public transportation, 'mainstreaming' means the physical integration of the handicapped with other members of the traveling public, and the HEW guidelines require that each mode of transportation in a transit system be accessible to the handicapped. . . . The 1976 DOT regulations clearly violated this requirement; they sanctioned the provison of separate transit services for the handicapped as an alternative to accessible bus and rail systems."

The 1979 DOT regulations were promulgated against this backdrop. Although long phase-in periods were permitted for certain very expensive structural changes to achieve accessibility, new stations and fixed and non-fixed vehicles purchased after July 2, 1979 had to be accessible for persons using wheelchairs.

The American Public Transit Association challenged the validity of the regulations. After a federal district court decision upholding the regulation *American Public Trans. Ass'n v. Goldschmidt*,[41] the Court of Appeals reversed the trial court and invalidated the regulations under authority of the Supreme Court's decision in *Southeastern Community College v. Davis*.[42]

The Court of Appeals noted that while a transit system might be required to take "modest, affirmative steps to accommodate handicapped persons," the DOT regulations required extensive modifications of existing systems and imposed extremely heavy financial burdens on local transit authorities. The Court therefore concluded that section 504 could not be used as the basis for the issuance of such "burdensome" regulations.

The Court then noted that it was possible that other statutory authority might provide a legal basis for the issuance of the challenged regulations. However, after reviewing the record, the Court was unconvinced that any other statutory basis had been relied on by the Administrator of UMTA as providing the legal authority necessary for imposing such obligations. As a result, the case was remanded to the Secretary to determine whether, for example, the Urban Mass Transportation Act independently authorized the regulations.

By this time the DOT access regulations had been targeted by the Presidential Task Force on Regulatory Relief. It was therefore no surprise that the Department did not take the Court of Appeals up on the invitation to base its action on a statute other than section 504. Instead, the regulations were withdrawn and new rulemaking was undertaken, resulting in the present regulations.

In 1983, Congress enacted section 317(c) of the Surface Transportation Assistance Act of 1982.[43] This section directed the Secretary of the Department of Transportation to issue final regulations within 180 days under section 504, under the Urban Mass Transportation Act and under the Federal-Aid Highway Act of 1973 establishing minimum criteria for the provision of transportation services to handicapped and elderly individuals. This section was based in large part on a GAO study documenting widespread deficiencies in the provision of transportation services to persons with disabilities. In interpreting this "minimum criteria" authority, the Department expressly rejected any notion that this Act was intended to impose a "same or comparable" requirement on transportation services for persons with disabilities.

In practice, this permissive approach has provided an open invitation for certain transit system to elect the dual-track option (referred to as "special service system" under the regulations) for mass transit, especially if the system is largely based on a non-fixed rail model. Specialized transportation vehicles are usually available on an on-call basis. Disabled persons with mobility impairments have little option but to make use of this "special" system since there is often no way of knowing in advance if the regularly scheduled bus has wheelchair access through lifts or other devices, or if those lifts or other devices are working.

As to monitoring of compliance, reducing the burden has become the watchword. Instead of ongoing compliance reviews to monitor corrections in the widespread deficiencies identified by the General Accounting Office, monitoring only takes place as part of a triennial review and evaluation process. Although that process involves the use of UMTA personnel, it is a "paper" review that is hardly "active" (the term used by the Department) in a civil rights sense.

D. Cost Cap

The Department's regulations concerning mass transit services for persons with disabilities[44] require recipients to provide disabled riders with transportation services that meet enumerated service criteria.[45] However, recipients are not required to exceed a limit on required expenditures of three percent of their operating expenses in order to do so. This provision is popularly referred to as the "cost cap." The articulated rationale for the "cost cap" is that it prevents recipients from incurring undue financial burdens in implementing services for persons with disabilities in violation of *Davis*.

The Department's 1986 regulations also specified those expenditures that could be considered in determining whether a recipient has reached the limit on required expenditures. Qualifying expenditures were defined to include costs associated with the half-fare program for elderly and handicapped riders in mainline transit service. This latter provision has been a topic of controversy since the notice of proposed rulemaking for these regulations. At that time, some persons commenting on behalf of the disability community opposed treating it as an eligible expense. The Department expressly rejected those comments in the final regulation and concluded that it was "reasonable to regard the incremental costs of compliance as eligible."

In 1988, Americans Disabled for Accessible Public Transportation (ADAPT), an organization of persons with disabilities and others dissatisfied with segregated transportation services, challenged this and other aspects of the cost cap. In *Americans Disabled For Accessible Public Transportation v. Dole*,[46] a federal district court ruled that the cost cap generally and the inclusion of expenses associated with the half-fare program violated federal law.

As a result of this decision, the Department has proposed to repeal the provision that permitted consideration of the costs associated with the longstanding half-fare program for elderly and handicapped riders in mainline transit service.[47] Significantly, the other part of that federal court decision, invalidating the cost cap more generally, is on appeal to the Court of Appeals for the Third Circuit.

E. Commercial Truck Driving

FHWA sets standards for commercial driver's licenses.[48] FHWA regulations prevent many otherwise qualified persons with disabilities from driving commercial motor vehicles in interstate commerce and have begun to exclude many similarly qualified persons with disabilities from driving in intrastate commerce.

Among these requirements are physical qualifications for drivers. For example, any individual with an "established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control, is disqualified from holding a commercial driver's license."[49] By its very nature, this provision establishes a conclusive presumption that no person who utilizes insulin to control diabetes can be qualified to drive a commercial vehicle.

The regulations also disqualify any individual with an "established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a motor vehicle." Again, by its very nature, this provision establishes a conclusive presumption that no person who utilizes medication to totally control seizures can be qualified to drive a commercial motor vehicle.[50]

Similar disqualifications are imposed in regard to other impairments. These disqualifications do not involve individualized determinations of ability of either safe driving or of risk.

Although these regulation have existed in largely their present form since 1970, the Reagan Administration expressly reviewed these regulations and adopted amendments in 1986. Moreover, this is the first Administration to have an effective opportunity to consider the impact of the 1978 amendments to the Rehabilitation Act on these regulations. In addition, it is the first Administration to have an opportunity to consider the impact of the Supreme Court decision in *School Board of Nassau County, Florida v. Arline*,[51] requiring individualized determinations. Despite these factors, no changes have yet been forthcoming.

In *Cousins v. Dole*,[52] the U.S. Court of Appeals for the First Circuit recently ruled that a commercial truck driver with a hearing impairment could maintain an action under section 504 of the Rehabilitation Act of 1973 to challenge these inflexible standards. The Department had strongly resisted any judicial review of its policies based on section 504. The outcome of this challenge will help determine future legality of these policies.

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IV. Failures in Enforcement

The major failure in regard to enforcement is not a matter of inattention or neglect, as in some agencies. The major failure regarding enforcement in Department of Transportation programs is a failure of policy. The Department has refused to adopt a view of America that envisions a barrier-free, integrated society. Instead, the Department has embraced a view of a segregated society in which the temporarily able-bodied have unimpeded access to the benefits of public transportation and many persons with disabilities have access, if at all, only to a segregated and unequal system.

V. Emerging Issues and Challenges

The major disability civil rights issue that will confront the Department in the new Administration is the balancing that should be permitted in public programs between financial burdens and barrier-free access. The adoption and implementation of a new philosophy of access and nondiscrimination will be the greatest challenge facing the new Administration. The most critical issue to be addressed will be whether the regulatory and litigation legacy of the Reagan Administration is such as to permit a new direction in the absence of new legislation in such areas as mass transit.

On October 24, 1988, the Department of Transportation published its most recent semi-annual regulatory agenda.[33] The following initiatives affecting the civil rights of persons with disabilities were highlighted in that agenda:

1. On October 3, 1988, the Department was to publish a notice of proposed rulemaking regarding nondiscrimination on the basis of handicap in federally conducted programs. That notice of

proposed rulemaking was not published as scheduled.

2. On September 20, 1988 the comment period on the notice of proposed rulemaking regarding nondiscrimination on the basis of handicap in air travel was to close. That period has now been extended until December 20, 1988, although final action was to have been completed by the Department on December 31, 1988, according to the agenda.

3. On May 23, 1986, the Department published a notice of proposed rulemaking regarding nondiscrimination on the basis of handicap in commuter rail programs.[54] The comment period on that NPRM closed on September 22, 1986. No action has been taken since that date.

4. On October 3, 1988, the Department was to publish a notice of proposed rulemaking regarding exit row seating. The regulation was to add new regulations to require air carriers to limit seating in exit rows to those persons they determine appear to be able to perform certain functions regarding emergency evacuation. This has been a significant issue among disability rights groups, especially among those groups representing persons with vision impairments. The notice of proposed rulemaking was not published as scheduled.

5. On November 25, 1987, the Department published an advance notice of proposed rulemaking in response to a petition filed by the American Diabetes Assocation to amend the current rule prohibiting drivers using insulin to control diabetes from driving in interstate or foreign commerce.[55] The comment period on the advance notice of proposed rulemaking closed on February 1, 1988.[56] No further action has been taken.

VI. Recommendations

Civil rights concerns have not been a major priority within the Department of Transportation. A critical first need is for the Department of Transportation to elevate the issue of nondiscrimination to a higher priority. This step can be accomplished by the development of a policy declaring that persons with disabilities should have unimpeded access to the same transportation system as everyone else.

As the Council on the Handicapped noted in its 1986 report, "Toward Independence," "Accessible transportation is a critical component of a national policy that promotes the self-reliance and self-sufficiency of people with disabilities. People who cannot get to work or to the voting place cannot exercise their rights and obligations as citizens. Accessible transportation will become increasingly important in coming decades as the baby-boom population grows older and experiences the increased transportation handicaps associated with aging."

While that policy could provide for a phase-in period of existing facilties to minimize costs, such a policy must provide for an integration of accessibiltiy requirements in all new facilities and in all new rolling stock. Fortunately, there are numerous cost-effective, working models of usable, accessible transportation systems. These models include those systems in Seattle, Washington; Champaign-Urbana, Illinois; Dayton, Ohio; Johnstown, Pennsylvania; and Palm Beach, Florida.

As the Council emphasized, these jurisdictions have all made significant and successful efforts to provide accessible public transportation which meets the needs of most of their citizens in a cost-effective manner. In addition, some interstate bus systems have attempted to develop accessible bus service and some airlines already provide effective, courteous service for persons with travel disabilities. Amtrak has developed and begun to implement a model transition plan for accessiblity that is very promising.

Civil rights considerations will need to be considered in the context of a largely deregulated transportation industry. While one can seriously question the wisdom of deregulation in light of its impact on safety, recently increasing fares, and discriminatory fare structures in certain markets, its impact on access have been even more directly negative.

Financial constraints are the only consideration preventing the Department of Transportation from implementing a truly barrier-free transportation system without sacrificing safety. The excuse of costliness is a bogus one. It is enlightening to consider the experiences of transit systems with air conditioning. These systems have been willing to expend the monies necessary to equip most of their buses with air conditioning, but not with lifts. These systems have been willing to incur the costs associated with repairing air conditioning systems, but not the costs associated with keeping their limited lifts operational. Curiously, the repair costs associated with air conditioning exceed those associated with lift maintenance by approximately 5 to 1.

The United States has the technology to create accessible airports and accessible planes. It has the technology to create accessible buses and trains and accessible stations. It has the personnel resources to create sensitive and qualified transportation personnel. It is just a matter of committing the financial resources to realize this potential. However, the free-market deregulated model is often viewed as inconsistent with this goal.

There are simply not enough potential passengers with disabilities or transportation personnel with disabilities to balance the costs of accessibility with increased revenues, as would be necessary to encourage a free market system to adequately address these concerns.

In the absence of sufficient financial inducements, American society with the leadership of the Department will have to commit itself to the achievement of a barrier-free transportation system. The Department needs to make an intermediate commitment to a regulated system that does not promote free-market philosophy above the civil rights of its citizens. And our nation needs to achieve a recognition that access is simply a cost of doing business in a civilized society. Specific legislative and administrative changes would help facilitate this goal. These changes include the following:

A. Explicit adoption of a national policy to require full accessibility to mass transportation over a realistic period of time.

B. Explicit recognition of a private right of action to permit persons with disabilities subjected to discrimination to seek redress.

C. Amend the Architectural Barriers Act of 1968 to require the Department of Transportation to establish accessibility standards for buildings, facilities, and public conveyances.

D. Extend nondiscrimination requirements to intercity and interstate bus transportation.

E. Establish a federal financial assistance program to permit low-income persons with disabilities and their families to purchase accessible private vehicles or to modify existing vehicles.

Many of these objectives (specifically A through D) are addressed by the Americans with Disabilities Act currently pending in Congress. The Department of Transportation would have enforcement authority for transportation accessibility under the proposed Act. The Department should publicly endorse the transportation access provisions of the legislation.

ENDNOTES

Chapter IV

1. The author, a Ph.D. candidate in political science at Harvard University, was a career employee of the U.S. Commission on Civil Rights during 1972-86, including six years service as Assistant Staff Director for Federal Civil Rights Evaluation, and directly observed some of the events reported here. These comments cannot be entirely neutral but presumably gain some detachment from two years' distance and reflection in an academic setting.
2. The Civil Rights Acts of 1964 and 1968, for example, assigned administrative enforcement responsibilities for protection of equal educational opportunity, equal employment opportunity, and fair housing to different federal entities, while reserving the related litigation responsibility to the Department of Justice. The Voting Rights Act of 1965 and its extensions of 1970, 1975, and 1982 added administrative enforcement responsibilities to the Department's litigation authority concerning voting rights. Also, a substantial number of state and local jurisdictions have various forms of anti-discrimination laws supported by various enforcement approaches. Some of these laws and agencies are well-developed and relatively well-coordinated with federal programs (*e.g.*, equal employment enforcement), while others are not (*e.g.*, general prohibitions of sex discrimination). See Charles S. Bullock III and Charles M. Lamb, *Implementation of Civil Rights Policy* (Monterey, CA: Brooks/Cole Publishing Co., 1984), chapter 1 and U.S. Department of Justice, Civil Rights Division, *Enforcing the Law, January 20, 1981 - January 31, 1987* (1987), at IX-1 [hereinafter *Enforcing the Law*]; *see also* American Jewish Congress, *State Civil Rights Agencies: The Unfulfilled Promise* (1986).
3. On the background of the contract compliance program, see Richard P. Nathan, *Jobs and Civil Rights* (Washington, D.C.: The Brookings Institution, 1969, prepared for the U.S. Commission on Civil Rights), at 87-89; U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort (1970)*, at 141-44; Ruth P. Morgan, *The President and Civil Rights* (Lanham, MD: University Press of America, 1987), at 39-59; Barry Goldstein, "The Importance of the Contract Compliance Program: Historical Perspective," (photocopy, 1981) and Virginia DuRivage, "The OFCCP Under the Reagan Administration," 1985 *Lab. L. J.* 360-68. On the history of prohibitions of racial discrimination in Federal financial assistance programs (Title VI, the prototype for all such provisions), *see generally*, John Hope II, *Minority Access to Federal Grants* (NY: Praeger, 1976); U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort--1974* [hereinafter (*1974 Report*)], *Vol. VI: To Extend Federal Financial Assistance* (1975), at 3-8; and Augustus Jones, Jr., *Law, Bureaucracy, and Politics* (Lanham, MD: University Press of America, 1982). [Title VI is codified at 42 U.S.C. 2000d (1982)]
4. *See 1974 Report--Vol. IV: To Provide Fiscal Assistance* (1975), *passim* and *Vol. VI: To Extend Federal Financial Assistance*, at 686-88.
5. *See*, *e.g.*, authorization for Law Enforcement Assistance Administration programs, Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3701 *et seq* (1977). *See* also, U.S. Commission on Civil Rights, *Civil Rights: A National Not a Special Interest* (1981), 105-116 [hereinafter *A National Not A Special Interest*].
6. The exact number of agencies and programs affected by Title VI-style provisions has always been somewhat elusive. The U.S. Commission on Civil Rights identified 25 major program agencies in the mid-1970s, before full implementation of protections against sex, age, and handicap discrimination. *1974 Report--Vol. VI: To Extend Federal Financial Assistance*, at 1-2. Creation of additional agencies and programs, use of delegation agreements to streamline enforcement, enactment of supplementary and overlapping prohibitions, and block-granting of programs in the 1980s all add to the problem of determining the exact number of agencies and programs affected by the financial assistance prohibitions. The Civil Rights Division recently reported there are 27 federal agencies enforcing more than 50 program statutes with related nondiscrimination provisions, in addition to the three "cross-cutting" requirements that it coordinates. Since 1978, almost 100 agencies must comply with prohibitions of handicap discrimination in their own programs. *Enforcing the Law*, at IX-1. *See* also, William Bradford Reynolds, Testimony before the Senate Judiciary Committee on the Civil Rights Division's FY 1989 Authorization (May, 26, 1988), 12 [hereinafter Reynolds Testimony].

7. *See, e.g.*, conclusions and recommendations in U.S. Commission on Civil Rights: *The Federal Civil Rights Enforcement Effort* (1970); *The Federal Civil Rights Enforcement Effort--One Year Later* (1972); *The Federal Civil Rights Enforcement Effort--A Reassessment* (1973); *The Federal Civil Rights Enforcement Effort -- 1974* (7 vols., 1974-77); *The Federal Fair Housing Enforcement Effort* (1979).
8. The sequence of coordination efforts from early 1965 to mid-1975 is discussed in *1974 Report--Vol. VI: To Extend Federal Financial Assistance* (1975), 653-65. Executive Order No. 11,247 (1965), 3 C.F.R. 348 (1964-65 Comp.); Executive Order No. 11,764 (1974), *reprinted in* 42 U.S.C.A. 2000d-1 (cum. 1975).
9. Pub. L. No. 92-261, 86 Stat. 103 (1972), codified at 42 U.S.C. 2000e-1 (1972).
10. For earlier *ad hoc* equal employment coordination efforts and the tribulations of EEOCC, see *1974 Report--Vol. V: To Eliminate Employment Discrimination* (1975), 574-616. *See* also U. S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort--1977: To Eliminate Employment Discrimination: A Sequel* (1977), 331-35 [hereinafter *1977 Sequel*].
11. *1974 Report--Vol. V: To Eliminate Employment Discrimination*, 663-66. At that time, the Commission also proposed consolidation of all equal employment enforcement operations into a single independent agency (*Id.* at 649-54) and abolition of EEOCC. (*Id.* at 673). It later abandoned the sweeping approach. *See 1977 Sequel.*
12. *1974 Report--Vol VII: To Preserve, Protect, and Defend the Constitution* (1977), chapter 2 and 187-90, 195-98.
13. For background on development of *Special Analysis J*, *See Id.*, chapter 2; for problems with it, *See Id.* at 61-64 and U. S. Commission on Civil Rights, *Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance* (1983), at 10-11 and Appendix A (and interagency correspondence cited therein) [hereinafter *Federal Civil Rights Commitments*].
14. Reorganization Plan No. 1 of 1978, *reprinted in* 5 U.S.C. app. at 131-33 (1988 supp.).
15. Executive Order No. 12,086, 3 C.F.R. 230 (1978 comp.). *See also*, Samuel W. Washington and William D. Faughnan, "The Old Compliance Ball Game--and the New," 7 *Journal of Intergroup Relations* (Sept. 1979), 4-17.
16. Executive Order No. 12,144, *reprinted in* 42 U.S.C.,A. 2000e-4 note (1981).
17. Executive Order No. 12,067, 3 C.F.R. 206 (1979), *reprinted in* 42 U.S.C.A. 2000e note (1981). EEOC also received authority over equal employment opportunity programs for federal employees in this reorganization.
18. Executive Order No. 12,259, 3 C.F.R. 307 (1981), *reprinted in* 42 U.S.C.A. 3608 (1988 supp.).
19. Executive Order 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C.A. 2000d-1 (1981). Statutory citations: 42 U.S.C. 2000d-1 (1981) (Title VI); 20 U.S.C. 1681 (1981) (Title IX); 29 U.S.C. 794 (1981) (Sec. 504).
20. 42 U.S.C. 6101 *et seq.* (1981). *See* also discussion in *Federal Civil Rights Commitments*, 65-70.
21. See discussion in *Federal Civil Rights Commitments*, 192-95 and materials cited therein.
22. U.S. Commission on Civil Rights, *Report to the President and the Congress* (1981), especially at 3-8.
23. *See, e.g.*, Charles L. Heatherly (ed.), *Mandate for Leadership* (Washington: The Heritage Foundation, 1981), at 447-50, 464-68, calling for, among other things, immediate elimination of racial and ethnic data collection on federal employees and major changes in the contract compliance program and Chester E. Finn, Jr., "Affirmative Action under Reagan," 73 *Commentary* (April 1982), 17-28, criticizing the administration for lacking both ideological purity and deregulatory vigor in failing "to hunt down quotas in every tangled thicket...." (22) [hereinafter Finn]. The Commission's growing concern was expressed in 1981 in *A National Not A Special Interest*.
24. These matters and the interpretations placed on them by civil rights groups are discussed in, among other places, The Leadership Conference on Civil Rights, *Without Justice* (Washington, D.C.: 1982) and the Washington Council of Lawyers, *Reagan Civil Rights: The First Twenty Months* (Washington, D.C.: 1982). For a later summary by a Civil Rights Division staffer, see Joel L. Selig, "The Reagan Justice Department and Civil Rights: What Went Wrong," 1985 *U. Ill. L. Rev.* 785-835.
25. *See* Finn.

26. Among many other possibilities, see the administration's response to the critiques cited in note 24: Cabinet Council on Legal Policy, "Civil Rights Fact Sheet" (Oct. 18, 1982). The Justice Department issued its own responses in April and November 1982. (Similar exchanges occurred in the context of the confirmation hearings on the ultimately unsuccessful nomination of the Assistant Attorney General for Civil Rights to be Associate Attorney General.) For a more recent statement, see William Bradford Reynolds, "The Reagan Administration and Civil Rights: Winning the War against Discrimination," 1986 *U. Ill. L. Rev.* 10001-21 (response to Selig article cited *supra*, note 24). Selig responded further, 1987 *U. Ill. L. Rev.* 431-43.

27. *See* Richard N. Holwill, *Agenda '83* (Washington, D.C.: The Heritage Foundation, 1983), at 226 and Stuart M. Butler, *Mandate for Leadership II* (Washington, D.C.: The Heritage Foundation, 1984), 156 [hereinafter *Mandate II*).

28. *Id.* and Abigail Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (Cambridge, MA: Harvard University Press, 1987), 111-16.

29. U.S. Commission on Civil Rights staff (including the author) interviews with members of the Equal Employment Advisory Council, Dec. 1984 and Jan. 1985, cited in U. S. Commission on Civil Rights, *Federal Enforcement of Equal Employment Requirements* (1987), 28, note 167 [hereinafter *Equal Employment Requirements*].

30. *See, e.g., Federal Civil Rights Commitments*, 191-92; *Equal Employment Requirements* (1987), 40-42, 61-62; and Bureau of National Affairs, *Daily Labor Report*, (Jan. 9, 1986), A-1-2 and texts at E-1-11. Policy conflicts included use of any numerical measures in affirmative action programs, the Department's own affirmative action plan, attorneys' fees in Title VII litigation, and the content of briefs in several cases involving discrimination charges against state and local governments. Inability to revise Executive Order 11246, a regulatory priority, is probably the most conspicuous example of the administration's lack of consensus on a fundamental issue. *See, e.g.*, comments of former Commission Staff Director Linda Chavez in "Where We Succeeded, Where We Failed," 43 *Policy Review*, (Winter 1988), 46 [hereinafter Chavez]. Explanation of that failure involves other factors, as well--notably the political strength of the opposition in Congress. It certainly can be argued, however, that civil rights forces could not have restored the contract compliance program through legislation had the administration succeeded in substantially changing it by executive order, as intended. *See* chapter XIV of this report for a discussion of this issue.

31. Terrell Bell, *The Thirteenth Man: A Reagan Cabinet Memoir* (NY: The Free Press, 1988), 100-112 discusses conflicts over briefs in the University of Richmond and Grove City College cases and reports a general lack of White House and Justice Deparment support for vigorous civil rights enforcement. *See* also Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (NY: Alfred A. Knopf, 1987), especially 81-114 on the efforts of Assistant Attorney General Reynolds to influence the Solicitor General's staff in preparing arguments and briefs for the Supreme Court.

32. 465 U.S. 555 (1984). *See*, Statement by William Bradford Reynolds on H.R. 700 (The Civil Rights Restoration Act of 1985) before a joint hearing of the House Committee on Education and Labor and the House Judiciary Subcommittee on Civil and Constitutional Rights (March 7, 1975), 4 and see the President's comments reported in *New York Times*, March 17, 1988, 1. The administration's position on the Civil Rights Restoration Act can be traced through *Congressional Quarterly Weekly Reports* from April 1984 through March 1988. *See* also chapters VII and X of this report.

33. *See, e.g., Congressional Quarterly Weekly Report*, (June 27, 1987), 1392 and (Aug. 6, 1988), 2203-04.

34. See *Congressional Quarterly Weekly Report*, (Oct. 8, 1988), 2810.

35. Review of EEOC's plans, for example, in the annual *Regulatory Program of the United States* (published by OMB) and its semi-annual regulatory agendas published each April and October in the *Federal Register* reveals that major rule-making activities have been stalled for years. There has been widespread consensus on the need for substantial revision of the complaint process for federal employees, for example, but EEOC has not been able to develop a comprehensive new program. Piecemeal changes have been "considered" and developed. Revision of the "Uniform Guidelines on Employee Selection Procedures," to take another example, was said to be a major priority, but implementation of a new policy is not likely during this administration. *See, e.g.*, U.S. Office of Management and Budget, *Regulatory Program of the United States, 1988-1989*

(1988), 512-15 and compare EEOC's sections of the *Unified Agenda of Federal Regulations* in 52 Fed. Reg. 51919 (Oct. 30, 1987) and 53 Fed. Reg. 42571-73 (Oct. 24, 1988). Explanations for delays include internal policy conflicts in EEOC and the administration, policy and procedural complexity, and political opposition to the likely direction of changes. Some of these problems are discussed in *Equal Employment Requirements*, 25-30. The record of other agencies is not necessarily better. The point is that policy development is slow, at best.

36. *See*, *Equal Employment Requirements*, 25-30, 80-81.
37. *See* materials in U.S. Commission on Civil Rights files on problems in OMB implementation of the Paperwork Reduction Act. *See also Federal Civil Rights Commitments*, 67.
38. The effects of these decisions on one agency's affirmative action program is discussed in U.S. General Accounting Office, *Minority Representation: Efforts of the Alcohol, Drug Abuse, and Mental Health Administration* (GAO/HRD-88-49) (1988), 4, 21-22, 25, 27. Rather than fighting to restore collection of applicant flow data, EEOC cut back on federal agency requirements for goals and timetables in its Management Directive 714 (Oct. 6, 1987). *Id.*
39. *See Federal Civil Rights Commitments*, 203-210. *See* also the introduction and Appendix A for discussion of the strengths and weaknesses of the data presented in the report and that provided by OMB.
40. *Equal Employment Requirements*, 17-18 (EEOC); 62-64 (Employment Litigation Section of Civil Rights Division); 73-74 (OFCCP).
41. Hanes Walton, Jr., *When the Marching Stopped: The Politics of Civil Rights Regulatory Agencies* (Albany: State University of New York Press, 1988), especially 81-85.
42. This issue is discussed at some length in agency chapters and the conclusion of *Federal Civil Rights Commitments*. *See* also *Equal Employment Requirements*, especially 99-101.
43. *See*, *generally*, National Academy of Public Administration, *Presidential Management of Rulemaking in Regulatory Agencies* (Washington, D.C., 1987) for a discussion of regulatory clearance.
44. 42 U.S.C. 3608(a) (1982).
45. Cited in note 18; see discussion in *Federal Civil Rights Commitments*, 111-112.
46. *Id.*, at 112, note 153.
47. Pub. Law No. 100-430, 102 Stat. 1619 (1988) (H.R. 1158, enacted Aug. 8, 1988, signed Sept. 13, 1988). In its most recent regulatory agenda, HUD lists a broad array of regulations under development, including Title VIII and coordination regulations. 53 Fed. Reg. 42004-07 (Oct. 24, 1988).
48. *See supra* note 20.
49. *See* the Justice Department's regulatory agendas, 52 Fed. Reg. 40472 (Oct. 26, 1987), 53 Fed. Reg. 13964 (Apr. 25, 1988), and 53 Fed. Reg. 42088 (Oct. 24, 1988) (RIN 1190-AA03).
50. The process established under Executive Order 12291 [46 Fed. Reg. 13193 (Feb. 17, 1981)] requires OMB clearance of all proposed and final regulatory issuances of executive branch agencies (and EEOC is listed as an affected agency). By agreement among the agencies, regulations developed pursuant to Executive orders 12067 and 12250 will be submitted for OMB clearances by EEOC and the Department of Justice, respectively, after those agencies have completed their reviews. See exchange of correspondence between EEOC and OMB reprinted in *Oversight on Equal Employment Opportunity and Affirmative Action*, Hearings before the House Education and Labor Subcommittee on Employment Opportunity (97th Cong., 1st sess., 1981), 383-87. Activities that might result in proposed rules were brought into this clearance process by Executive Order 12498, 50 Fed. Reg. 1036 (Jan. 4, 1985).
51. *See Federal Civil Rights Commitments*, 200-202; Reynolds testimony, 13, and *Enforcing the Law*, IX-3. The first also discusses the controversy over the substance of the Sec. 504 prototype, as does Catherine Lovell, *Intergovernmental Regulatory Changes Under the Reagan Administration* (Riverside, CA: University of California Graduate School of Management, Final Report to the National Science Foundation, 1984), 176-78.
52. *Enforcing the Law*, chap. IX and Reynolds Testimony, 13. *See* also *Federal Civil Rights Commitments*, 192-200.

53. 29 C.Fed. Reg. part 1691 (1986) and 28 C.Fed. Reg. part 42 (1986). *See* discussion in U.S. Equal Employment Opportunty Commission, *18th Annual Report* (1984), 34-35, *Federal Civil Rights Commitments*, at 158, 196-97 and *Equal Employment Requirements*, 42. EEOC staff consult informally with staff of other agencies on a wide range of policy and operational matters; see its annual reports. *Equal Employment Requirements* cites recent accomplishments.

54. *See Federal Civil Rights Commitments*, 192 and *Equal Employment Requirements*, 41-42. *See, also, supra* note 38, on easing federal agency affirmative action plan requirements.

55. *See* discussion in *Equal Employment Requirements*, 40-42.

56. Pub. Law No. 85-315, 71 Stat. 634, codified at 42 U.S.C. 1975-1975e (1981); the Commission was reauthorized in 1960, 1964, 1967, 1970, 1972, and 1978; for specific citations, see U.S. Commmission on Civil Rights, *Statute, Rules, and Regulations* (1980). Jurisdiction was expanded, at different times, to include sex, age, and handicap discrimination and contracted to preclude any work on matters concerning abortion. For the history of the Commission, see, generally, Foster Rhea Dulles, *The Civil Rights Commission, 1957-65* (East Lansing: Michigan State university Press, 1968); George Theodore Sulzner III, "The United States Commission on Civil Rights: A Study of Incrementalism in Policy-Making" (Ph.D. Diss., Univ. of Michigan, 1978); Theodore Hesburgh, "Integer Vitae: Independence of the United States Commission on Civil Rights," 46 *Notre Dame Lawyer* 445-60 (1974) [hereinafter Hesburgh], and Jocelyn Frye et al., "The Rise and Fall of the United States Commission on Civil Rights," 22 *Harvard Civil Rights-Civil Liberties Law Review* 450-505 (1987), 450-75 [hereinafter *Rise and Fall*). This discussion draws heavily on personal observation, participation in Commission meetings, and conversations with Staff Directors and Commissioners during 1977-86 and with staff in 1987-88.

57. *See, supra and infra* notes for a sample of Commission publications, particularly in the enforcement oversight area; the *Catalog of Publications*, issued, for example, in 1981, 1982, and 1984 lists publications; the annual *Request for Appropriations* describes most program activity, including Congressional testimony, interagency policy correspondence, meetings and conferences, and so on; the monthly Office Director's reports and Staff Director's Report to the Commissioners provide extensive details on agency activities.

58. *See, e.g., A National, Not A Special Interest*, n.23.

59. *See* such reports and statements as *The Voting Rights Act: Ten Years After* (1975); *Social Indicators of Equality for Minorities and Women* (1978); *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* (1981); *The Black/White Colleges: Dismantling the Dual System of Higher Education* (1981); *The Tarnished Golden Door: Civil Rights Issues in Immigration* (1980), and *The Voting Rights Act: Unfulfilled Goals* (1982).

60. *See* such reports and statements as *With All Deliberate Speed: 1954-19??* (1980); *Minorities and Women as Government Contractors* (1975), and *The Equal Rights Amendment* (1981).

61. *See, e.g., Statement on Civil Rights Enforcement in Education* (1982); "Statement on the Government's Brief in *Grove City College v. Bell*" (Aug. 9, 1983); *A National Not a Special Interest*; *Federal Civil Rights Commitments*, and *Equal Opportunity in Presidential Appointments* (1983). In addition, difficulties obtaining information from various agencies, including the White House, had led the Commission in 1982-83 to the brink of issuing subpoenas to the Departments of Labor and Education.

62. The struggle over the Commission's membership is detailed in "Civil Rights Commission Reconstituted,"39 *Congressional Quarterly Almanac* (1983), 292-95 [hereinafter *CQ Almanac*]; *Rise and Fall*, 476-81; and by participants in the struggle. *See* William Taylor, "Farewell, Civil Rights Commission," 238 *The Nation*, (Feb. 4, 1984), 113, 128-31 [hereinafter Taylor]; Mary Frances Berry, "Taming the Commission on Civil Rights," *240 The Nation* (Feb. 2, 1985), 106-08 [hereinafter Berry]; and Leadership Conference on Civil Rights, " Special Report No. 1: U.S. Commission on Civil Rights," *Civil Rights Monitor* (April 1986), 2-3 [hereinafter *Special Report*].

63. *See* Berry; *The Final Report of the U.S. Commission on Civil Rights* (Nov. 1983).

64. *See, especially*, Taylor. *See* also, American Civil Liberties Union, "Reagan Pulls Last-Minute Double Cross on Civil Rights Commission," *7 Civil Liberties Alert* (Jan. 1984), 4-5.

65. *CQ Almanac* (1983), 293.

66. Pub. Law No. 98-183, 97 Stat. 1301, codified at 42 U.S.C. 1975-1975(f) (1988 supp).

67. 42 U.S.C. 1975(b) (1988 supp). The President's removal power is limited to cases of neglect of duty or malfeasance.

68. Id. at 1975d(a).

69. *See*, *Rise and Fall*, 481-83 for a summary discussion of this question; the authors conclude that the arrangement probably is constitutional.

70. "Statement of the United States Commission on Civil Rights concerning the Detroit Police Department's Racial Promotion Quota," Jan. 17, 1984; see also *New York Times*, Jan. 17, 1984, p.1. The Vice Chairman issued a statement attacking comparable worth, a subject the Commission then voted to study.

71. *See* , *e.g.*, *Rise and Fall*, 483-86; Berry, and *Special Report*, 1, 8.

72. *40 CQ Almanac* (1984), 375.

73. U.S. General Accounting Office, *U.S. Commission on Civil Rights: Concerns About Commission Operations* (May 1988) (GAO/GGD-88-71) [hereinafter *GAO Report*), combining information from investigations of the Commission's operations during FYs 1983-86 requested by "chairpersons" of four House committees and subcommittees and of operations during FYs 1978-82 subsequently requested by two Republican Senators and three House members. GAO presented its findings on the first study in a hearing before the House Judiciary Subcommittee on Civil and Constitutional Rights, 99th Cong., 2d Sess. (March & April, 1986). GAO criticized agency recordkeeping and reported violations of federal personnel procedures, particularly regarding the hiring and use of consultants and other noncareer employees. GAO also raised questions about Commissioner travel and billing, especially by the Chairman, about State Advisory Committee (SAC) appointment practices, and about accounting of certain program funds. On behalf of a majority of the Commission, the Chairman and then Staff Director bitterly objected to the audit as biased and politically motivated. They presented alternative data and explanations that GAO did not consider sufficiently exculpatory. (*See* GAO letter with attachments reprinted in hearings cited above at 287, ff.) *See* also, *Special Report*, 3-7 for a summary of GAO's key 1986 findings and the agency's response. The 1988 report presented extensive budget and staffing data but noted difficulty finding entirely comparable information for the earlier period. Despite the Chairman's contention that the investigation, if fairly presented, showed basic continuity of management practices (see letter reprinted in *GAO Report*, 91-94), GAO maintained there were substantially greater violations of personnel procedures for noncareer employees after 1983 and statutory violations concerning some Commission travel; GAO also argued that some of the Chairman's speeches violated anti-lobbying restrictions and reported again the significant changes in the composition of SACs after 1983 (Id., 9-11 and 95-96).

74. The idea of defunding the Commission was advanced, though not adopted, as early as 1984. That year, responding to the Commission's January policy decision, the House Appropriations Committee informed the agency of its belief that "'consideration of issues related to the civil rights implications of budget and appropriations decisions remains useful and important'" for its deliberations. Its report is quoted in *CQ Almanac* (1984), at 375.

75. These are summarized in *42 CQ Almanac* (1986), 189-92 and *Rise and Fall*, 493-95; see also *Special Report*, at 15.

76. *Id. See also 43 CQ Almanac* (1987), 430, 432. Civil rights forces and the Commission minority generally have supported defunding. *See*, *e.g.*, letter from Phyllis McClure, NAACP Legal Defense and Educational Fund, Inc. to Rep. Julian Dixon (June 25, 1986); statement of Commissioner Mary Frances Berry (for herself and Commissioners Francis S. Guess and Blandina Cardenas Ramirez) before the Senate Appropriations Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies, (April 8, 1987). In testimony before the House Appropriations Subcommttee on Commerce, Justice, State and the Judiciary, however, a representative of the National Organization for Women Legal Defense and Educational Fund suggested maintaining the restrictions pending appointment of new Commissioners (statement of Leslie Wolfe, April 7, 1987). In his statement at the same hearing, Rep. Don Edwards, Chairman of the House Judiciary Subcommittee on Civil and Constitutional Rights, took a similar position, though he charged the Commission had defied Congressional intent to maintain strong regional and enforcement monitoring programs. He argued that a subsequent reauthorization of the Commission would be more difficult than living with the current situation.

77. *See Congressional Quarterly Weekly Report* (Oct. 1, 1988), 2692-93.

78. Overall, fulltime equivalent staff has dropped from 193 in 1986 to 61 in 1988. U.S. Commission on Civil Rights, *Request for Appropriations, FY 1988* (1987), at 8-10 [hereinafter *FY 88 Appropriations Request*) and *Request for Appropriations, FY 1989* (1988), 10-13 [hereinafter *FY 89 Appropriations Request*). Probably no more than one-third of these conduct program activities fulltime.

79. Presenting the agency's FY 1989 request, former Chairman Pendleton told the House Appropriations Subcommittee it should defund the Commission if it were not willing to fund it at a level permitting full program operations. Reported in U.S. Commission on Civil Rights, *Civil Rights Update* (May 1988) [hereinafter Civil Rights Update).

80. *FY 88 Appropriations Request*, 12-16 and *FY 89 Appropriations Request*, at 14-18. The narrative format of the appropriation request no longer tracks clearly either the agency's organization or the workload factors presented. Thus, it is not always possible to be sure what a "completed" project or activity is.

81. *See* reports in *Civil Rights Update*, issued periodically during 1987-88.

82. *Id.* and sources cited in note 78.

83. *See* the "accomplishments" discussions in the appropriations requests cited *supra*, note 78. At the request of the appropriations committees, GAO is monitoring Commission spending and has reported overall compliance with the restrictions. U.S. General Accounting Office, *U.S. Commission on Civil Rights: Compliance with Appropriations Provisions* (June 2, 1988) (GAO/GGD-88-91).

84. *See, e.g., EEOC Policies Regarding Goals and Timetables in Litigation Remedies* (99th Cong., 2d sess.) (1986); Staff Report on "Investigation of Civil Rights Enforcement by EEOC," serial no. 99-Q (99th Cong., 2d sess.) (May 1986) and *Oversight Hearing on EEOC's Proposed Modification of Enforcement Regulations, including the Uniform Guidelines on Employee Selection Procedures*, serial no. 99-63 (99th Cong., 1st sess.) (Oct. 1985). At the latter hearing, the EEOC Chairman complained that "it often seems like I am on trial here," (10) and subcommittee members commented on his defensiveness. More recently, see, *e.g.*, *Report on EEO and Affirmative Action in the Southern California Aerospace Industry*, Comm. Serial No. 100-4 (100th Cong., 2d Sess.) (1988) based on hearings held during 1987.

85. *See , e.g., EEOC Update: Policies on Pay Equity and Title VII Enforcement* (99th Cong., 1st sess) (1985); *Processing EEO Complaints in the Federal Sector* (99th Cong. 1st sess.) (1985), and *EEOC Delays in Processing Age Discrimination Charges* (100th Cong., 2d Sess.) (1988).

86. *See , e.g., Investigation of Civil Rights Enforcement by the Department of Education*, Hearings before a Subcommittee of the House Committee on Government Operations (99th Cong., 1st Sess.) (1985) and the full committee's report of the same title (House Rep. No. 99-458) (1985).

87. *Hearings on Oversight of ADEA Enforcement* (Comm. Pub. No. 100-656) (100th Cong., 2d Sess.) (1988).

88. *See, e.g.*, U.S. General Accounting Office, *Equal Employment Opportunity: EEOC and State Agencies Did Not Fully Investigate Discrimination Charges* (GAO/HRD-89-11) (1988).

89. The impact of *Grove City* (and uncertainty about its staying power)is discussed in Phyllis McClure, "The Erosion of Civil Rights Enforcement," *17 The Black Scholar* (May-June 1986), 10-18. The new law may require review of cases rejected under *Grove City* and reinvestigation of pending cases. Meanwhile, the court has freed ED/OCR of the performance requirements imposed in long-standing litigation. *See Adams v. Bennett*, (675 F.Supp. 668), (D.D.C., 1987).

90. *See, e.g., Enforcing the Law*, at IX-2-3.

91. At least as long ago as 1971, former Chairman Theodore Hesburgh argued that the Commission's jurisdiction should be extended to cover a broad range of human rights, including subsistence rights. Jack Nelson, *The U.S. Commission on Civil Rights: A More Activist Role?* (Nashville: Race Relations Information Center, 1971), at 19. Possible protection of subsistence rights through various constitutional and legal interpretations is receiving increasing attention. *See, e.g.*, Charles L. Black, Jr., "Further Reflections on the Constitutional Justice of Livelihood," 86 *Columb. L. Rev.* 1103-17 (Oct., 1986); William L. Taylor, "*Brown*, Equal Protection, and the

Isolation of the Poor," 95 *Yale L. J.* 1700-27 (1986), and Henry Shue, "Subsistence Rights: Shall We Secure *These* Rights?", at 74-100 in Robert A. Goldwin and William A. Schambra (eds.), *How Does the Constitution Secure Rights?* (Washington, D.C.: American Enterprise Institute, 1985). The Commission's jurisdiction should be broad enough to explore the possibility of expanding constitutional rights.

92. *See* Hesburgh for discussion of the history of the Commission's independence. The authors of *Rise and Fall* distinguish "independence" as a matter of "institutional design," "Presidential and Congressional deference," and "institutional competence," and find the agency wanting in all three dimensions (at 486-504).

93. *Mandate II*, 157, 159. *See also Special Report*, at 11, quoting the Staff Director and Chairman on links to the administration, Chavez, at 46.

94. The authors of *Rise and Fall* also consider the appointments arrangements a "defective" invitation to polarization, without developing their argument (at 483).

95. *Id.*, at 505.

96. These are reported in various issues of *Civil Rights Update; see, e.g.*, March 1988; April 1988. (The latter reports a conflict among commissioners at their March meeting about the presence of a panel to discuss the reauthorization.) SAC members may provide the nucleus of such a constituency.

ENDNOTES:

Chapter V

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1. *See* Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. Ill. L. Rev. 785 (1986).
2. *See* Reynolds, *The Reagan Administration and Civil Rights: Winning the War Against Discrimination*, 1986 U. Ill. L. Rev. 1001 (1987).
3. *See* Selig, *The Reagan Justice Department and Civil Rights: Professor Selig Responds to Assistant Attorney General Reynolds*, 1987 U. Ill. L. Rev. 431 (1988).
4. *See* Selig, *The Justice Department and Racially Exclusionary Municipal Practices: Creative Ventures in Fair Housing Act Enforcement*, 17 U.C.D. L. Rev. 445 (1984).
5. *See* Selig, *supra* note 1; Selig, *supra* note 3.
6. *See* Selig, *supra* note 1, at 790-95 ("respect for the law," "regard for the facts," "institutional continuity," "historical continuity," "appropriate priorities," "positive public image," "separation from politics," "utilization of institutional strengths," "self-restraint," and "promotion of peace"). The cited exposition of these principles is reprinted as an appendix to this essay.
7. They are also relevant to changes of legal position in new cases, but this essay focuses on the question of changes of position in pending litigation, the more specialized problem which the Citizens' Commission on Civil Rights asked me to address.
8. *See, e.g.*, Selig, *supra* note 1, at 796-814 (school desegregation); *id.* at 817-21 (tax exemptions for racially discriminatory schools).
9. *See, e.g.*, *id.* at 799, 800, 805 (Kansas City, Kansas, school desegregation case)(grades 1-2); *id.* at 816 (Beaumont, Texas, school desegregation case)(grades 1-3).
10. This differentiates the hypothetical from the cases in which so-called post-*Green* or post-*Swann* motions requesting further desegregation were filed routinely in the wake of the Supreme Court's decisions changing or clarifying the applicable legal standards in *Green v. County School Board*, 391 U.S. 430 (1968) and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).
11. *See* Selig, *supra* note 1, at 821-29; Selig, *supra* note 3, at 440-42.
12. *See* Selig, *Affirmative Action in Employment: The Legacy of a Supreme Court Majority*, 63 Ind. L.J. 301 (1988); Selig, *supra* note 1, at 821-29; Selig, *supra* note 3, at 440-42.
13. *Compare* System Fed'n No. 91, Ry. Employees' Dep't v. Wright, 364 U.S. 642, 651-53 (1961) (change in law requires change in decree) *with* United States v. Swift & Co., 286 U.S. 106, 114-17, 119-20 (1932)(insufficient change in conditions to justify change in decree).
14. *System Fed'n*, 364 U.S. at 652.
15. *Swift*, 286 U.S. at 119.
16. *Cf.* Selig, *supra* note 1, at 825-29.
17. *See id.* at 831. *Cf.* Selig, *supra* note 4, at 474 n.128, 482 n.171, 486 nn.193-94.
18. *Cf.* Selig, *supra* note 1, at 803, 813 (raising new allegations at too late a stage unfair to defendants).
19. *See generally* Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 La. L. Rev. 789 (1988).
20. For example, partly because of the necessity of preserving the government's ability to change its policy and its legal position on an issue under a new administration, nonmutual collateral estoppel is not available against the government. United States v. Mendoza, 464 U.S. 154, 159-63 (1984)(offensive estoppel); United States v. Stauffer Chemical Co., 464 U.S. 165, 173 (1984) (defensive estoppel)(dictum).
21. *See* Selig, *supra* note 1, at 795-817.

22. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)(remedy); Davis v. Board of School Comm'rs, 402 U.S. 33 (1971)(remedy); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973)(liability).
23. *See* Selig, *supra* note 1, at 790-95. The cited exposition of those principles is reprinted as an appendix to this essay.
24. *See* Selig, *supra* note 1, at 790-91.
25. *E.g.*, cases cited *supra* note 22. *See* Selig, *supra* note 1, at 807-11, 816.
26. *See* Selig, *supra* note 1, at 791.
27. *See Keyes*, 413 U.S. at 201-03 (presumption regarding impact); *id.* at 208-09 (presumption regarding intent).
28. *See* Selig, *supra* note 1, at 794.
29. *See id.* at 791.
30. *See id.* at 792.
31. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), *overruling* National League of Cities v. Usery, 426 U.S. 833 (1976).
32. *See* Selig, *supra* note 1, at 792.
33. *See id.* at 792-93.
34. *See id.* at 793.
35. *See id.* at 793-94.
36. *See id.* at 794.
37. *See id.* at 794-95.
38. *Compare* Reynolds, *supra* note 2, at 1014-21 *with* Selig, *supra* note 1, at 821-29 *and* Selig, *supra* note 3, at 440-42 *and* Selig, *supra* note 12.
39. *See, e.g.*, Selig, *supra* note 4, at 478-82, 484-88 (cases challenging racially exclusionary municipal practices under Fair Housing Act).
40. *See, e.g.*, In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1501 (11th Cir. 1987), *cert. granted on another issue sub nom.* Martin v. Wilks, Personnel Bd. Jefferson County v. Wilks, Arrington v. Wilks, Nos. 87-1614, 87-1639, 87-1668, 56 U.S.L.W. 3864 (U.S. June 20, 1988)(United States estopped from collateral attack on consent decrees to which it is signatory).
41. *See, e.g.*, Selig, *supra* note 4, at 448-50, 450 n.18.
42. *See id.* at 450 n.18.
43. *See* United States v. Starrett City Assocs., 840 F.2d 1096 (2d Cir. 1988), *cert. denied*, 57 U.S.L.W. 3333 (U.S. Nov. 7, 1988), *aff'g* 660 F. Supp. 668 (E.D.N.Y. 1987). This essay was written in August 1988.
44. *See id.*, 840 F.2d at 1105 (Newman, J., dissenting). *Cf.* Bob Jones University v. United States, 461 U.S. 574 (1983). *See* Selig, *supra* note 1, at 817-21.
45. *Cf.* Selig, *supra* note 1, at 817-21, 832-33 (discussing *Bob Jones*, *Plyler v. Doe*, 457 U.S. 202 (1982), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982)).
46. *See generally* Landsberg, *supra* note 19.

Chapter VI

1. Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 Judicature 324 (1987).
2. *Id.* at 331, 334.
3. *See* discussion at Part II.C. below.
4. *The Performance of the Reagan Administration in Nominating Women and Minorities to the Federal Bench: Hearing Before the Senate Judiciary Committee*, 100th Cong., 2d Sess. (1988) [hereinafter *Reagan Nominations Hearing*] (Testimony of Stephen J. Markman, Assistant Attorney General).
5. Supreme Court nominees are rated only as not qualified, not opposed or well qualified.
6. *Washington Legal Found. v. Department of Just.*, 691 F. Supp. 483 (D.D.C. 1988), prob. juris. noted, 57 U.S.L.W. 3394 (U.S. Dec. 5, 1988) (Nos. 88-429, 88-494).
7. 43 Cong. Q. 2510 (1985).
8. *Id.*
9. Freedman, *Assembly-Line Approval: A Common Cause Study of Senate Confirmation of Federal Judges* 6 (1986).
10. Interview with Reginald C. Govan, a Washington D.C. based attorney who served as Special Counsel and Chief Investigator of the Senate Judiciary Committee during those years.
11. *Reagan Nominations Hearing*, *supra* note 3, at 13-14 (testimony of Markman).
12. *Id.* at 14.
13. *See* discussion of these and other nominees in Part II.D, below.
14. *See, e.g.*, Caplan, *Judicial Restraint Means Activism on the Right*, Wash. Post, Jan. 19, 1986, at A1.
15. H. Schwartz, *Packing the Courts* 41 (1988).
16. *See, e.g.*, The Federalist No. 76 (A. Hamilton).
17. *Reagan Nominations Hearing*, *supra* note 3, at 72 (Statement of Estelle Rogers, Federation of Women Lawyers).
18. Statistics are as of October 1988. *Year End Report*, The Alliance for Justice's Judicial Selection Project (Dec. 1988).
19. *Reagan Nominations Hearing, supra* note 3, at 27 (testimony of Markman).
20. *Nomination of David B. Sentelle: Hearings Before the Senate Judiciary Comm.*, 100th Cong., 1st Sess. (1987) (Statement of Paul L. Friedman, President of the District of Columbia Bar).
21. The 1988 nomination of Judith Hope, the lone female nominee, was not voted on before Congress adjourned.
22. *See* Goldman, *supra* note 1, for a more detailed statistical comparison.
23. Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 Judicature 136, 140 (1987).
24. *Id.* at 140.
25. *Reagan Nominations Hearings, supra* note 3, at 32 (testimony of Markman).
26. The Fifth and Ninth Circuits, because of their size, were divided into two panels each.
27. For a thorough report of the commission approach, see L. Berkson & S. Carbon, *The United States Circuit Judge Nominating Commission: Its Members, Procedures and Candidates* (1980).
28. *L.A. Times*, Mar. 18, 1986, at 1.
29. *N.Y. Times*, June 24, 1986, at 3.
30. For a thoughtful and articulate opinion on how Americans think about judges, and the Supreme Court in particular, see Carter, *The Confirmation Mess*, 101 Harv. L. Rev. 1185, at 1189-95 (1988).
31. Adler, *Not That Dumb*, Am. Law., Jan.-Feb. 1988, at 128.
32. *Id.* at 32-33.

33. The holding in *Schempp* was expressly applied to the classroom posting of the Ten Commandments in *Stone v. Graham*, 449 U.S. 39 (1980) ("The pre-eminent purpose of posting the Ten Commandments, which do not confine themselves to arguably secular matters, is plainly religious in nature, and the posting serves no constitutional educational function." 449 U.S. at 41.

34. The summaries included here are condensed primarily from Professor Herman Schwartz's excellent book on the Reagan judicial selection process, *Packing the Courts*.

35. Schwartz, *Packing the Courts* at 96.

36. Upon Sessions' defeat, Attorney General Meese called him "the unfortunate victim of [liberal organizations] who appear willing to smear anyone in order to advance their agenda." *Id.*

37. Carter, *The Confirmation Mess*, 101 Harv. L. Rev. at 1199.

Chapter VII

1. G. Orfield, F. Monfort, R. George, *School Segregation in the 1980s: Trends in the States and Metropolitan Areas* (July, 1987) [hereinafter Segregation in the 1980s] at 37.
2. G. Orfield, F. Monfort, *Racial Change and Desegregation in Large School Districts: Trends Through the 1986-87 School Year* (NSBA, June, 1988) [hereinafter NSBA Report] at 2, 3.
3. *Id.* at 30-31. These districts include major cities such as Atlanta, Detroit, New York City, Chicago, New Orleans, and Washington, D.C.
4. *Segregation in the 1980s* at 2; *NSBA Report* at 40, 46-7.
5. J. Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 Harv. Civ. Rights Civ. Lib. L. Rev. 55, 58 (Winter 1987) [hereinafter *Adequate Education*].
6. *Segregation in the 1980s* at 11.
7. *NSBA Report* at 3. *See also Adequate Education* at 57.
8. *Adequate Education* at 56.
9. *Id* at 57.
10. *NSBA Report* at 4. *See also, e.g., Adequate Education* at 56-59; American Council on Education and Education Commission of the States, *One-Third of a Nation* (1988).
11. Statement of Fred R. Harris, Roger W. Wilkins, and David Ginsburg before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary (May 25, 1988) [hereinafter Harris Testimony] at 11-12 (quoting University of Chicago political scientist Gary Orfield). *See also*, A. Harris, R. Wilkens [hereinafter Wilkens], *Quiet Riots*: *Race and Poverty in the United States*. (Pantheon Books, 1988) at 179.
12. *See* Annual Report of the Attorney General [hereinafter *Annual Report*] (1966) at 196.
13. *See* Annual Report (1974) at 69-70.
14. For example, the Division helped to establish and implement the principle that school boards have an obligation to act affirmatively in order to remedy school segregation. *See Green v. County School Board*, 391 U.S. 430 (1968).
15. *See* H. Rep. No. 458, 99th Cong., 1 Sess. 1, 2 (1985) [hereinafter H. Rep. 458].
16. *See* G. Orfield, *Must We Bus?* (1978) at 279; NSBA Report at 25-26; Civil Rights Leadership Conference Fund, *An Oath Betrayed: The Reagan Administration Civil Rights Enforcement Record in Education* (October, 1983) [hereinafter *An Oath Betrayed*] at ii-iii, 27-28.
17. A parallel lawsuit focusing on OCR enforcement activities in the North and the West was filed in 1975, which was subsequently combined for the most part with the *Adams* litigation. *See Brown v. Weinberger*, 417 F. Supp. 1215 (D.D.C. 1976).
18. *Id.* at 3-5. *See, e.g., Adams v. Richardson*, 356 F. Supp. at 92, 94 (D.D.C.), *modified and aff'd*, 480 F.2d. 1159 (D.C. Cir. 1973); *Adams v. Weinberger*, 391 F. Supp. at 269 (D.D.C. 1975).
19. *See* H. Rep. 458 at 5; *Adams v. Bennett*, 675 F. Supp. at 668, 671 (D.D.C. 1987). The decision in *Adams v. Bennett*, in which an appeal is now pending, dismissed the *Adams* litigation on procedural grounds. At least during the pendency of the appeal, OCR has agreed voluntarily to adhere to the *Adams* procedures and timeframes. *See* order in *Women's Equity Action League v. Bennett*, No. 88-5065 (D.C. Cir. filed Aug. 8, 1988).
20. *See* H. Rep. 458 at 6; C. Brown, J. Reid, *New Federal and State Roles to Achieve Equity in Education* (1987) [hereinafter Brown] at 88.
21. H. Rep. 458 at 6; Brown at 88.
22. United States Commission on Civil Rights, *Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance* (Nov. 1983) [hereinafter *1983 CRC Report*] at 215-16.
23. *E.g.*, although the percentage of black students attending predominantly minority schools decreased from 1968 to 1976, the percentage increased from 62.9 percent in 1980 to 63.5 percent in 1984. *See* Harris Testimony at 11. Similarly, as of the late 1980s, the "gap between black and white college-going rates is the largest it has been in more than a quarter of a century." *Id.* at 12.
24. The subject of OCR enforcement activities with respect to special education and handicapped children is discussed separately and is not included herein.

25. *See* Civil Rights Division, *Enforcing the Law* (Jan. 31, 1987) at III-I to III-B; *Annual Report* (1981-1986). In a partial oral response to an FOIA request on Oct. 11, 1988, a Division spokesman confirmed that the only four new cases were in Chicago (a nondesegregation case involving special education), Richland Parish, Louisiana, Bakersfield, California, and Phoenix, Arizona. It was the Phoenix case which was filed to carry out an OCR settlement, as discussed in H.R. 458 at 17-18. *See also* Testimony of Julius Chambers of NAACP Legal Defense Fund in Hearings before a Subcommittee of the House Committee on Government Operations (July 18, 1985) [hereinafter 1985 OCR Hearings] at 34-35. In addition to the four new cases discussed above, the Division has intervened in three cases since January, 1981, in West Feliciana Parish, Louisiana, Bolivar County, Mississippi, and Oktibbeha County, Mississippi. Recently, the Division has also filed a suit against a Hazard, Kentucky school district for sex discrimination for refusing to rehire a female school bus driver who took sick leave. *See Education Daily* (Oct. 14, 1988) at 2.

26. *See, e.g.*, Statement of William Bradford Reynolds before Subcommittee on Civil and Constitutional Rights of House Committee on the Judiciary (April 17, 1985) [hereinafter 1985 Reynolds House Statement] at 15.

27. *See* Statement of William Bradford Reynolds before Subcommittee on Civil and Constitutional Rights of House Committee on the Judiciary (April 15, 1983) [hereinafter 1983 Reynolds House Statement] at 14-15.

28. *See* 1985 Reynolds House Statement at 15.

29. *See* H. Rep. 458 at 6-10; Testimony of Phyllis McClure, NAACP Legal Defense Fund, before Senate Committee on the Judiciary (June 5, 1985) at 589-600; H. R. Rep. No. 12, 97th Cong., 2d Sess. (1982) [hereinafter H. Rep. 12] at 3, 25; Washington Council of Lawyers, *Reagan Civil Rights: The First Twenty Months* (1982) at 31.

30. For example, the six most integrated metropolitan areas in the country as of 1984 were operating under interdistrict desegregation plans. *See* Segregation in the 1980s at 16-17. *See also id.* at 3; United States Commission on Civil Rights, *Statement on Metropolitan School Desegregation* (1977); R. Wolf, L. Sherwood-Fabre, *et al.*, *Beyond School Desegregation* (Indiana Univ., Oct., 1982) (study of metropolitan desegregation in Indianapolis); R. Green, J. Darden, *et al.*, *Metropolitan School Desegregation in New Castle County, Delaware* (Rockefeller Found., July 1, 1982).

31. *See United States v. Board of School Commissioners*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980) ("Indianapolis"); *Washington Post* (June 4, 1981) at A-2 (St. Louis).

32. *See Liddell v. Board of Educ.*, 567 F. Supp. 1037, 1040-41 (E.D. Mo. 1983), *modified and affirmed*, 731 F.2d 1294 (8th Cir.) (*en banc*), *cert. denied*, 469 U.S. 81 (1984) [hereinafter *Liddell*]; Brief of the United States on Proposed Settlement Agreement in *Liddell* (E.D. Mo., submitted April 27, 1983).

33. *See* Letter from U.S. Commission on Civil Rights to President Reagan (Feb. 12, 1982) at 9; *New York Times* (Aug. 28, 1981); Memorandum and Order, *Ross v. Houston Indep. School Dist.*, Civ. Action No. 10444 (S.C. Tex. June 17, 1981).

34. *See Board of School Directors of the City of Milwaukee v. State of Wisconsin*, 649 F. Supp. 82 (E.D. Wisc, 1985) (*Board of School Directors*). The Milwaukee case was settled in 1987 through adoption of a plan in which the suburban districts agreed to expand significantly their support for and participation in a program of voluntary interdistrict transfers between the city and the suburbs. *See* Settlement Agreement in *Board of School Directors* (E.D. Wisc. submitted Aug. 10, 1987).

35. *See* Brief for the United States as *Amicus Curiae* in *Little Rock School District v. Pulaski County Special School District*, No. 85-1078 EA (8th Cir. filed March 4, 1985) [hereinafter Little Rock brief].

36. *See, e.g., Milliken v. Bradley*, 418 U.S. 717, 755 (1974) (Stewart, J., concurring); *Keyes v. School District No. 1*, 413 U.S. 189, 202 (1973); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 211 (1971); *Indianapolis*, 637 F.2d. at 1109-11; *Oliver v. Kalamazoo Board of Educ.*, 368 F. Supp. 143, 181-83 (W.D. Mich. 1973), *aff'd*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

37. *See United States v. Yonkers Board of Educ.*, 624 F. Supp. 1276 (S.D. N.Y. 1985), *aff'd*, 837 F.2d. 1181 (2d Cir. 1987), *cert. denied*, 56 U.S.L.W. 3848 (1988).

38. *See* Little Rock brief at 37-38.

39. *See, e.g.*, Testimony of William Bradford Reynolds before House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, 97th Cong., 1st Sess. (Nov. 19, 1981) ("Reynolds 1981 House Testimony") at 614.

40. *See* Segregation in the 1980s at 3, 16, 21. *Accord, e.g.*, W. Hawley, R. Crain, *et al.*, *Assessment of Current Knowledge About School Desegregation Strategies, Vol. 1, Strategies for Effective Desegregation: A Synthesis of Findings* (1981) (Hawley) at 26-27 (concluding that mandatory reassignment "is the most effective method of reducing racial isolation"); N. Devins, "Closing the Classroom Door on Civil Rights", *Human Rights* (Winter, 1984) 26 (Devins) at 46; L. Daniels, "In Defense of Busing", *N.Y. Times Magazine* (April 17, 1983) ("Daniels") at 34, 36.

41. *New York Times* (June 7, 1985) at A-27. *See also* Daniels at 37.

42. *See* H. Rep. 12 at 10-19; Daniels at 36-37; Hawley at 26-27; Manihoff, "Community Attitudes in Charlotte", 16 *Integrated Education* (Sept.-Oct., 1978) at 9; Hearings of School Desegregation before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 97th Cong., 1st Sess. (1981) at 18-19 (Statement of Dr. Jay Robinson), 446 (Statement of Joseph E. Johnson).

43. H. Rep. 12 at 10-19; Daniels at 36-37.

44. H. Rep. 12 at 10-19; *New York Times* (June 7, 1985) at A-27; Daniels at 97.

45. *See* Library of Congress, Congressional Research Service, *Busing and the Lower Federal Courts*, reprinted in Hearings on School Desegregation Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 97th Cong., 1st Sess. (1981) at 655-63.

46. *See Seattle School Dist. v. State of Washington*, 473 F. Supp. 996, 1001-02, 1007, 1010 (W.D. Wash. 1979), *aff'd*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982).

47. *See* Brief for the United States in Washington v. Seattle School Dist., 458 U.S. 457 (1982); J. Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. Ill. L. Rev. 785, 832 (1985) [hereinafter Selig].

48. *See Washington v. Seattle School Dist.*, 458 U.S. 457, 471-72 (1982); Selig at 832.

49. *See Kelley v. Metropolitan County Board of Educ.*, 687 F.2d 814 (6th Cir. 1982), *cert. denied*, 459 U.S. 1163 (1983).

50. *Metropolitan County Board of Education v. Kelley*, 459 U.S. 1183 (1983).

51. *See* Selig at 796-817, discussing history of *United States v. Texas Education Agency*, 699 F.2d 1291 (5th Cir.), cert. denied, 464 U.S. 824 (1983) and *United States v. Unified School Dist. No. 500*, 610 F.2d 688 (10th Cir. 1979).

52. *See* Selig at 806, 816.

53. *See Davis v. East Baton Rouge Parish School Board*, 514 F. Supp. 869, 873-74 (E.D. La. 1981), *modified*, 533 F. Supp. 1161 (D.D. La. 1982) (Shep); *Washington Post* (Aug. 10, 1982) at A-3; *Washington Post* (Dec. 11, 1982) at A-9.

54. *See* Davis, *supra*, 514 F. Supp. at 871; *id.*, 498 F. Supp. at 588.

55. *Washington Post* (Jan. 20, 1983) at A-17.

56. *See* Reynolds 1983 House Testimony at 16.

57. *See* Reynolds 1981 House Testimony at 631-34.

58. *See* Green, *supra*, 391 U.S. at 437, 440. *See also, e.g.*, Swann, *supra*, 402 U.S. at 26.

59. *See, e.g., Morgan v. Kerrigan*, 530 F. 2d 401, 410 and n.10 (1st Cir. 1975), *cert. denied*, 426 U.S. 935 (1976); 418 U.S. 717 (1974); *Kelley v. Gunn*, 456 F.2d 100, 108-09 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973).

60. *See* Lowry and Associates, *Survey of Magnet Schools: Analyzing a Model for Quality Integrated Education* (Dep. of Educ. 1983); Gewirtz, *Choice In the Transition: School Desegregation and the Corrective Ideal*, 86 Columbia L. Rev. 728 (1986) [hereinafter Gewirtz] at 764-65, 767-68; H. Rep. 12 at 19, 21-22; *Liddell*, 731 F.2d at 1311.

61. *See* School Law News (April 28, 1988) at 7-8; D. Moore, S. Davenport, *The New Improved Sorting Machine* (National Center for Effective Secondary Schools, April 15, 1988); Gewirtz at 765 n.121. *Cf. Liddell*, 731 F.2d at 1311 (noting that magnet schools in St. Louis would not "create a dualistic system with elitist schools" because they were a "single element of the panoply of remedies" including educational improvements in regular district schools).

62. *See New York Times* (Feb. 14, 1982) at 35; 1981 Reynolds House Testimony at 620-21, 628.

63. *E.g.*, over 80 percent of Chicago's black students are in schools which are over 90 percent minority, making Chicago the seventh most segregated city in the country according to this measure. *See* NSBA Report at 34. *See also id.* at 29-31, 42, 44.

64. *See* Letter from Daniel Oliver, general counsel of the Department of Education, to William Bradford Reynolds, [hereinafter Oliver letter], plus accompanying litigation report (July 9, 1982); *Washington Post* (Jan. 26, 1984) at A-1, A-10. The Bakersfield district was already busing some 3,000 students for nondesegregation related purposes. *New York Times* (Feb 1, 1984) at A-26. A 220-page ruling was issued by an administrative law judge in 1978 finding intentional segregation by Bakersfield, including the use of busing to maintain segregation. *See In re Bakersfield City School District*, Pocket No. S-99 (Dept. of HEW and National Science Foundation, Jan. 12, 1978).

65. *See* Consent Decree in *United States v. Bakersfield School District*, No. CV-F-84-39 EDP, (E.D. Cal. Jan. 25, 1984); *Washington Post* (Jan. 26, 1984) at A-1, A-10.

66. *Washington Post* (Jan. 26, 1984) at A-1; *Wall Street Journal* (Oct. 22, 1985) at 21.

67. *See, e.g., New York Times* (Feb. 1, 1984) at A-26; *New York Times* (Feb. 12, 1984) at 28; Gewirtz at 771; Statement of Lawyers' Committee for Civil Rights Under Law in Hearings before Senate Judiciary Committee (June 5, 1985) at 246-47; *Washington Post* (Jan. 26, 1984) at A-1; M. Simms, *The Impact of Changes in Federal Elementary and Secondary Civil Rights Policy* (Urban Inst., 1984) [hereinafter Simms] at 23-24.

68. *See OCR* litigation report enclosed with Oliver letter at 5 (describing "remaining intentionally segregated elementary schools" as of 1980-81); Exhibit 1 to Complaint in *United States v. Bakersfield City School District* (E.D. Cal.) (Jan. 25, 1984) (listing racial composition of all Bakersfield schools, which indicated that 10 out of 11 racially identifiable schools in 1980-81 remained racially identifiable in 1982-83 by having racial imbalanced student populations which deviated by more than 20 percent from districtwide racial percentage); Exhibit 1 to First Annual Report of Bakersfield City School District in *United States v. Bakersfield* (listing racial composition of all Bakersfield schools in 1984-85, which indicated that all 10 racially identifiable schools in 1982-83 remained racially identifiable).

69. *See* Exhibit 1 to Fourth Annual Report of Bakersfield City School District in *United States v. Bakersfield* (listing racial composition of all Bakersfield schools in 1987-88, which indicated that 5 of 10 racially identifiable schools in 1982-83 remained racially identifiable).

70. *Id.* at 33. *See also*, Consent Decree in *United States v. Board of Education of the Lima City School District, No. L-80-723 (N.D. Ohio 1984) and in United States v. Phoenix Union High School Distrist No. 210*, (D. Ariz. 1985); Gewirtz at 771. The Phoenix agreement, which embodied a settlement reached between OCR and the district, is cirticized as inadequate according to OCR's own analysis in H. Rep. 458 at 17-18.

71. *See Washington Post* (Oct. 22, 1983) at A-3; Statements of Division attorneys Jay Heubert and Gregg Meyers in Hearings before Senate Committee on the Judiciary (June 18, 1985) at 958-969; Memorandum for the Attorney General from Gregg Meyers, Trial Attorney, General Litigation Section, Civil Rights Division (Aug. 27, 1983) at 4-6; Memorandum to William French Smith, Attorney General, from Timothy M. Cook, Civil Rights Division (Oct. 18, 1983) at 18-19.

72. *See* Proposed Decree in *United States v. Hattiesburg Municipal Separate School District*, Civ. No. 4706 (S.D. Miss., submitted July 17, 1984), discussed in Statement of Lawyers' Committee on Civil Rights Under Law in hearings before Senate Committee on the Judiciary (June 5, 1985) ("Lawyers' Committee Statement") at 247 n.3; *United States v. Pittman by Pittman*, 808 F.2d 385 (5th Cir. 1987).

73. In response to such concerns, Congress has recently considered enacting legislation, similar to legislation passed in 1974 concerning antitrust cases, which would require the Justice Department to provide notice and an opportunity to be heard in court to affected parties before obtaining consent decrees in civil rights cases. *See* H. Rep. No. 113, 99th Cong., 1st Sess. 9, 31 (1985); 15 U.S.C. § 16(e) (antitrust consent decree requirement).

74. *See* Brief of the United States on Proposed Settlement Agreement in *Liddell v. Board of Education* (E.D. Mo., submitted April 27, 1983) at 4-5.

75. *See Liddell*; Fifth Report of Voluntary Interdistrict Coordinating Council for the Settlement Agreement in *Liddell* (Aug. 15, 1988) at i-vii.

76. *See* Gewirtz at 756; *Liddell*, 731 F.2d at 1311; *New York Times* (Feb. 1, 1984) at A-26.

77. *See Milliken v. Bradley*, 433 U.S. 267 (1977).

78. *See* Reynolds 1981 House Testimony at 619-620.

79. *See* Simms at 76.

80. *See* Gewirtz at 771 n. 148; Simms at 24-25; *Washington Post* (May 23, 1984) at A-1, A-7; *Congressional Quarterly* (June 9, 1984) at 1365-67; *United States v. Board of Educ. of City of Chicago*, 567 F. Supp. 272-76 (N.D. Ill.), *aff'd in part and vacated in part*, 717 F.2d 378, 383-84 (7th Cir. 1983); *id.*, 588 F. Supp. 132, 237-40, 245-46 (N.D. Ill.), *vacated and remanded*, 744 F.2d 1300 (7th Cir. 1984) *cert. denied*, 471 U.S. 1116 (1985); *id.*, 621 F. Supp. 1296 (N.D. Ill. 1985); *id.*, 642 F. Supp. 206 (N.D. Ill. 1986); Lawyers' Committee Statement at 253.

81. *See* Selig at 832; Brief for the United States as Amicus Curiae in *Plyer v. Doe* at 4-6.

82. *See Milliken v. Bradley*, 433 U.S. 267 (1977). *See, e.g., Liddell*, 731 F.2d at 301-23; *Little Rock School Dist. v. Pulaski County School Dist.*, 778 F.2d 404, 435-36 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 292 (1986); *Evans v. Buchanan*, 447 F. Supp. 982, 1038 (D. Del.), *aff'd*, 582 F.2d 750 (3rd Cir. 1978), *cert. denied*, 446 U.S. 923 (1980); *Berry v. School Dist. of Benton Harbor*, 515 F. Supp. 344 (W.D. Mich. 1981), *aff'd and remanded*, 698 F.2d 813 (6th Cir.), *cert. denied*, 464 U.S. 892 (1983).

83. *See Wall Street Journal* (Oct. 22, 1985) at 1; *Liddell*, 731 F.2d at 1301.

84. *See Liddell*, 731 F.2d at 1301 n.6, 1301-23.

85. *See* Motion of Plaintiff-Intervenors for Leave to File a Second Amended Complaint and to Add State Defendants in *United States v. Yonkers Board of Educ.*, No. 80 Civ. 6761 (LMS) ("Yonkers") (S.D. N.Y. filed Sept. 17, 1987); Motion of Yonkers School Board for Joinder of Additional Parties, Leave to Amend Its Answer to Add a Cross-Claim, and For Realignment in *Yonkers* (S.D. N.Y. filed Sept. 17, 1987); Memorandum of the United States in Opposition to Yonkers School Board's Motion (S.D. N.Y. filed Oct. 20, 1987).

86. *See* S. Rosenfeld, *Dollars and Schools: Resource Development*, Southern Changes 12, 13 (May-June, 1988).

87. *Education Daily* (Sept. 27, 1988) at 3.

88. *See* Gewirtz at 770. Over the last few years, additional federal funding for magnet schools has been provided through the federal magnet school assistance program, under which districts which operate magnet schools may apply for federal aid.

89. *See* Department of Education, *Fiscal Year 1988 Budget Request*.

90. *Keyes*, 413 U.S. at 203. The principles of *Keyes* were reaffirmed by the Court in *Columbus Board of Educ. v. Penick*, 443 U.S. 449, 458, 458 n.7, 465 n.13, 467-68 (1979) and in *Dayton Board of Educ. v. Brinkman*, 443 U.S. 526, 535, 537-38, 541-42 (1979).

91. *See* 1981 Reynolds House Testimony at 618.

92. *See* Selig at 810-811; Devins at 46-47.

93. *Washington Post* (Jan. 9, 1982) at A-1. *See also, e.g.*, Selig at 817-821; Simms at 25-26; Devins at 48-50; *Washington Post* (Feb. 2, 1982) at A-1; *Washington Post* (Feb. 3, 1982) at A-1; Memorandum for the United States in *Bob Jones University and Goldsboro Christian Schools v. United States* (Jan. 8, 1982).

94. *See, e.g.*, Selig at 810-21.

95. *See Evans v. Buchanan*, 393 F. Supp. 428-437 (D. Del.), *aff'd*, 423 U.S. 963 (1975).

96. *See, e.g.*, Ohio Admin. Code § 3301-39 (1983).

97. *See Green, supra* 391 U.S. at 439, 441; *Raney v. Board of Education*, 391 U.S. 443, 449 (1968).

98. *See Green, supra*, 391 U.S. at 435, 439; *Swann, supra*, 402 U.S. at 32.

99. *See Milliken II*, 433 U.S. 282; *Swann*, 402 U.S. at 21.

100. *See* Memorandum of the United States at *Amicus Curiae* on Defendant's Motion of Jan. 19, 1984 at 7 in *Keyes v. School District No. 1*, No. C-1499 (D. Colo.); Lawyers' Committee Statement at 250.

101. *See Dayton Board of Education v. Brinkman*, 443 U.S. 526, 538 (1979). *Accord, Wright v. Council of Emporia*, 407 U.S. 451, 461-62 (1972).

102. *See* Order in *United States v. Georgia*, No. 12972 (N.D. Ga. July 23, 1973).

103. *See* letters of Feb. 3, 1988 from William Bradford Reynolds to clerk of court in *United States v. Georgia* and to Norman Chachkin of NAACP Legal Defense Fund enclosing proposed joint stipulations. An additional district was added, increasing the number to nine.

104. *See* Motions to Have Stipulation Approved in *United States v. Georgia*, No. 2771 (M.D. Ga. filed Feb. 23, 1988).

105. *See* Memorandum in Opposition to Motion to Have Stipulation Approved in *United States v. Georgia*, no. 2771 (M.D. Ga. filed March 22, 1988).

106. *See Education Week* (May 4, 1988) at 9; *Atlanta Constitution* (April 20, 1988) at 1-B, 6-B; OCR Letter of Finding re: Complaint 04-87-1128 against Jasper County School District (July 22, 1987).

107. *See School Law News* (June 23, 1988) at 1, 2; *Education Week* (May 4, 1988) at 9. The private plaintiffs filed discovery requests for information concerning the basis for a possible ruling on unitary status with respect to each district at the time they opposed the Division's motion.

108. *See* Motion to Withdraw Joint Stipulation of Dismissal by Macon County in *United States v. Georgia*, No. 2771 (M.D. Ga. filed March 31, 1988).

109. *See* Transcript of Status Conference in *United States v. Georgia*, No. 2771 (M.D. Ga. May 20, 1988).

110. *See* Order in *United States v. Georgia*, No. 2771 (M.D. Ga. Aug. 24, 1988) at 8, 9.

111. *See* Education Week (May 4, 1988) at 9; School Law News (June 23, 1988) at 1.

112. *See Dowell v. Board of Educ. of Oklahoma City*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). The courts are split on this issue, and the Division has recently argued successfully that a school district is free to alter a desegregation plan once it is found unitary unless plaintiffs can prove discriminatory intent. *See Riddick v. School Board of City of Norfolk*, 784 F.2d 421 (4th Cir.), *cert denied*, 107 S. Ct. 426 (1986). Particularly where a court has entered an injunction requiring that a desegregation plan be implemented, the approach in *Oklahoma City* more effectively protects against resegregation and upholds the integrity of court orders while allowing school districts to seek to change or eliminate desegregation plans where appropriate. *See Pasadena City Board of Educ. v. Spangler*, 427 U.S. 424, 439-40 (1976) (noting "well-established" principle that parties "subject to the commands of an injunctive order must obey those commands, not withstanding eminently reasonable and proper objections to the order, until it is modified or reversed"). As one former Division attorney has recently written, it is extremely important that courts scrutinize efforts to modify or eliminate desegregation plans, even after unitary status has been achieved, in order to preserve the benefits of desegregation and remain consistent with the principles of *Swann*. *See* B. Landsberg, *The Desegregated School System and the Retrogression plan*, 48 La. L. Rev. 789 (1988).

113. *See, e.g.*, 1983 CRC report at 24-25; Brown at 89, 91; H. Rep. 458 at 6.

114. *See* H. Rep. No. 334, 100th Cong., 1st Sess. (1987) ("H. Rep. 334") at 37-42.

115. *See* H. Rep. 458 at 30-31.

116. *See* H. Rep. 334 at 40.

117. *See* Brown at 98-106.

118. *See* Memorandum from Antonio Califa and Kristine Marly of OCR to Clarence Thomas of OCR re: *Adams* Timeframe Project (Nov. 16, 1981) at 5-6 (noting that significant amount of time may be lost during clearance and approval process concerning complaint investigations and compliance reviews).

119. *See, e.g.*, Hearings before House Subcommittee on Government Operations, 99th Cong., 1st Sess. (July 18, 1985) at 72 (Statement of Marcia Greenberger).

120. *See* Brown at 84, 89-95.

121. *See* An Oath Betrayed at 23 (noting that OCR improperly relied on state education department findings even though the state agency has "been shown to be unreliable in identifying violations of mandated procedures" and had found districts in compliance where "OCR later found pervasive violations0.

122. 1983 CRC report at 29.

123. *Id.* at 26, 29-30. *See also* Brown at 27-31.

124. Brown at 92. *See also* 1983 CRC report at 27-31.

125. 1983 CRC report at 31. Despite OCR's own assessment of the relative effectiveness of compliance reviews, it apparently considered in 1985 substituting the provision of technical assistance for compliance reviews, a switch which OCR's own Policy and Enforcement Service considered illegal. *See* H. Rep. 458 at 29-30.

126. *See* Memorandum from William Pierce, Council of Chief State School Officers, and Phyllis McClure, NAACP Legal Defense and Education Fund to Thomas Burns, Department of Education (July 1, 1984) I"CCSSO/LDF Memo") at 4-5. The CCSSO/LDF Memo also discussed the history of the OCR survey, which was conducted on an annual basis until 1978.

127. *See* CCSSO/LDF Memo at 6-9; Testimony of Julius Chambers before Subcommittee of House Government Operations Committee (July 18, 1985) ("Chambers Testimony") at 39-41; *Education Week* (June 1, 19880 at 1, 20. Both CCSSO and LDF protested the 1984 changes.

128. *See Education Week* (June 1, 1988) at 1, 20.

129. *See Education Week* (June 1, 1988) at 20; Chambers Testimony at 40.

130. *See* CCSSO/LDF Memo at 6, 8; Chambers Testimony at 41-44. The Chambers Testimony also pointed to two other at least temporary problems with OCR compliance reviews: a 1985 experiment called for random selection of sites for compliance reviews in some regions, making it impossible to target such reviews qualitatively to focus on areas where surveys and other methods suggest the existence of serious problems, and the effectiveness of some OCR compliance reviews was impaired by focusing only on specific educational programs, apparently as a result of the decision in *Grove City College v. Bell*, 465 U.S. 535 1984), which limited the scope of Title VI and similar civil rights laws to particular programs receiving federal aid. *See* Chambers Testimony at 45-49. Recent passage of the Civil Rights Restoration Act of 1987 overruling *Grove City*, 42 U.S.C. § 2000d-4a, should make it possible to return most compliance reviews to their previous scope and depth. The impact of *Grove City* prior to this new legislation is discussed in further detail in Section 5, *infra*.

131. *See* Memorandum from Alico Coro of OCR to OCR regional directors regarding selection of sites for compliance reviews (July 14, 1987).

132. *See* Letter of Phyllis McClure of the NAACP Legal Defense Fund to Mr. LeGree Daniels of OCR (September 16, 1987). Indeed, in 1985 OCR considered substituting techical assistance for compliance reviews altogether a switch that its own policy and enforcement section considered illegal. See H. Rep. 458 at 29-30.

133. *See* H. Rep. 458 at 31-2.

134. *Id.*

135. *See* letter from Phyllis McClure of NAACP Legal Defense Fund to Terence J. Pell of OCR (April 13, 1988) and enclosed memoranda.

136. *Id. See also* letter from Jean P. Peelen of OCR to Dr. Richard C. Wallace, Jr., Superintendent of School District of Pittsburgh (Nov. 17, 1986) at 2-3 (citing *Caulfield v. Board of Educ.*, 486 F. Supp. 862, 874 (E.D. N.Y. 1979) to support conclusion that "OCR may take action under Title VI to redress" employment practices with discriminatory effects on school children).

137. *See* letter from Phyllis McClure of NAACP Legal Defense Fund to Mrs. Legree Daniels of OCR (Oct. 4, 1988).

138. H. Rep. 458 at 3. *See also* An Oath Betrayed at 26-29.

139. H. Rep. 458 at 6-11. *See also* An Oath Betrayed at 29-30.

140. Letter from Stewart B. Oneglia, Chief of Coordination and Review Section of Civil Rights Division to Kristine M. Marcy of OCR (Nov. 13, 1981). *See also* H. Rep. 458 at 27-29; An Oath Betrayed at 22-26.

141. *See* H. Rep. 458 at 6-18; An Oath Betrayed at 22-30.

142. *See* An Oath Betrayed at 19-22.

143. H. Rep. 458 at 16-17.

144. Statement of Antonio J. Califa in Hearings before Subcommittee of House Government Operations Committee (July 18, 1985) ("Califa Statement") at 143.

145. *See* OCR *Investigation Procedures Manual* at 69-70; Letter from Phyllis McClure of NAACP Legal Defense Fund to Mrs. LeGree Daniels of OCR (April 4, 1988).

146. H. Rep. 458 at 18-22.

147. *See* Califa Testimony at 144; *Fair Test Examiner* (Summer, 1988) at 7, 8.

148. *See, e.g., Fair Test Examiner* (Summer, 1988) at 8 (citing statement of Senator Gore that in one state, 40% of black five year olds failed a "readiness" examination and were placed in special classrooms before even beginning formal schooling); *id.* at 1, 7, 14.
149. *See* An Oath Betrayed at 23, 25 (discussing cases in Hertford County and Clinton, North Carolina; Newton, Aberdeen, and Oxford, Mississippi; and Autaga County, Alabama).
150. *See* H. Rep. 458 at 7-8.
151. *See* Califa Testimony at 144.
152. C. Brown, G. Partee, *See Equity in Education*, in The Women's Economic Justice Agenda 159, 159 (1987) ("Sex Equity").
153. National Federation of State High School Assoc., *National Federation Handbook 1985-86* (1986).
154. PEER Report No. 6, *The Heart of Excellence: Equal Opportunities and Educational Reform* (Fall 1987) ("PEER Report").
155. *Id.*
156. *See* Hearings before House Judiciary Comm. on Civil and Constitutional Rights, 100th Cong., 1st Sess. (April 23, 1987) (Testimony of Phillis Rosser). This discrepancy affects both verbal and math scores on the SAT.
157. *Id.*
158. *Id.*
159. *Id.*
160. In March 1985, of people between the ages of 25-64, only 44% of female nongraduates, compared to 73% of male nongraduates, were employed. Sex Equity at 159.
161. *Id. See also* PEER Report, *Learning Her Place: Sex Bias in the Elementary Classroom.*
162. *See, e.g.*, S. Klein (ed.), *Handbook for Achieving Sex Equity Through Education* (1985).
163. National Education Association, *Estimates of School Statistics* 1987-88 (1988); Hearings on S557 before the Senate Comm. on Labor and Human Resources, 100th Cong., 1st Sess. 46 (1987) (Statement of Eleanor Smeal) ("Smeal Statement").
164. C. Shakeshaft, *A Gender at Risk*, 67 Phi Delta Kappan 499 (1986).
165. 20 U.S.C. § 1681 *et seq.* Although Title IX was enacted in 1972, no implementing regulations were adopted until 1975.
166. Note, *Grove City College v. Bell and Program-Specificity: Narrowing the Scope of Federal Civil Rights Statues*, 34 Cath. U.L. Rev. 1087, 1088.
167. Sex Equity at 161.
168. *Investigation of Civil Rights Enforcement by the Department of Education: Hearings before the House Subcommittee of the Committee on Government Operations, 99th Cong. 1st Sess. (1985) 70, 71 (statement of Marcia Greenberger) ("Greenberger Statement").*
169. A Lexis search performed in early September, 1988 yielded no reported Title IX decisions pursued by the Department of Justice since 1980. (Because all cases are not reported, this may not be completely accurate). Anecdotal evidence from attorneys who follow Title iX enforcement also indicates that the Department of Justice has played virtually no role. As indicated earlier, the Division has very recently filed a suit accusing a Kentucky school district of sex discrimination for refusing to rehire a bus driver who took sick leave. *See, Education Daily* (Oct. 14, 1988) at 2.
170. H. Rep. 458 at 20.
171. *Id.*
172. Greenberger Statement at 71.
173. *Id.* at 71.
174. *Id.* at 72.
175. 104 S. Ct. 1211 (1984).
176. M. Greenberger and C. Beier, *Federal Funding of Discrimination: The Impact of Grove City College v. Bell* (March 1987) at 1. ("Federal Funding of Discrimination").
177. Note, *Grove City*, 34 Cath. U. L. Rev. at 1123.

178. Federal Funding of Discrimination at 2. See W. Richey, *Enforcement of Civil Rights Laws Called "Piecemeal"*, Christian Science Monitor, March 18, 1986 at 3 (discussing ACLU-NAACP-LDF report on the impact of *Grove City). See also* Letter from Alicia Coro of OCR of Representative Pam Edwards (March 31, 1987) (noting that in 1984 through 1986, OCR narrowed the scope of 72 compliance reviews and closed in whole or in part 88 compliance reviews and 674 complaint investigations.)

179. Memorandum from Harry Singletary Assistant Secretary for Civil Rights to Regional Civil Rights Directors (July 31, 1984).

180. *In the matter of Pickens County School District*, Docket No. 84-IX-11 (Final Dec. of Civil Rights Reviewing Auth. Oct. 28, 1985); *see* Federal Funding of Discrimination at 7 (discussing the final decision).

181. Smeal Statement at 39.44.

182. *See* Hearings before Senate Subcom. on Labor, Health and Human Services of the Comm. and Appropriations, 100th Cong. 1sr Sess. (June 4, 1987) (Statement of Jill Miller). WEEA had set up a National Advisory Council on Women's Educational Programs, which has recently issued a report stating that progress has been made in sex equity in education. The report has been criticized, however, for its limited definition of sex equity and its failure to analyze such problems as sex segregation in vocational education. The council was recently abolished. *Id. See* NACWEP, *Opinions and Decisions in Womens Educational Equity* (1988).

183. *See* H. Rep. 458 at 33 ("OCR should develop guidelines which require that violations of law be corrected before any settlements are accepted").

184. *See* Smeal Statement at 43.

185. D. Waggoner, "Estimates of the Need for Bilingual Education and the Proportion of Children in Need Being Served," *NABA News*, Vol.IX, No. 4, Summer 1986 at 7.

186. T. H. Bell, "The Condition of Bilingual Education in the Nation, 1982, A Report from the Secretary of Education to the President and the Congress" at 2, 7, 8 ("Bell report").

187. *Id.* at 8, 9.

188. W. J. Bennett, "The Condition of Bilingual Education in the Nation, 1986, A Report from the Secretary of Education to the President and the Congress" at 4.

189. J. Crawford, "Lawmakers, Lobbyists Challenge E. D.'s Bilingual-Education Data," *Education Week*, April 30, 1986 at 13.

190. Bell Report at 13.

191. L. Orum, The Education of Hispanics: Selected Statistics, (Washington, DC: National Council of La Raza, 1985) at 8-9 [hereinafter Orum].

192. *Children in Poverty* (Washington, DC: Congressional Research Service and the Congressional Budget Office, 1985) at 3.

193. Orum, at 21.

194. Bell report at 13.

195. *Id.*

196. J. Baratz and R. Duran, "The Educational Progress of Language Minority Students: Findings from the 1983-84 NAEP Reading Survey", (Princeton, NJ: Educational Testing Service, 1985).

197. *Id.* at 6.

198. *Id.* at 32.

199. *Id.* at 34.

200. *Id.* at 17.

201. *Id.* at 19.

202. *Id.* at 29.

203. *Id.* at 25.

204. *Id.* at iv.

205. Bilingual Education Act, 20 U.S.C. 880(b) (1968), P.L. 90-247, Title VII, Sect. 702.

206. S. Gilbert Schneider, *Revolution, Reaction, or Reform: The 1974 Bilingual Education Act*. (New York: L.A. Publishing Co, Inc., 1976 at 22 [hereinafter Schneider].

207. Congressional Record, December 15, 1967 at §37037.

208. 1968 Bilingual Education Act, Sec. 704(c).

209. H. Rep. 95-1137 (9th Cong., 2nd Sess.) at 83.

210. Memorandum from J. Stanley Pottinger, Director, OCR/DHEW to School Districts With More Than Five Percent National Origin-Minority Group Children regarding Identification of Discrimination and Denial of Services on the Basis of National Origin (1970).

211. *See Lau v. Nichols*, 483 F.2d 791 (9th Cir. 1973) at 799.

212. 414 U.S. 563, 94 S.Ct.786 (1974).

213. *Id.*, 94 S.Ct. at 788.

214. *Id.* at 789.

215. *Id.*

216. *Northwest Arctic School District v. Califano*, No. A-77-216 (D. Alaska Sept. 29, 1978).

217. 20 U.S.C. 1703(f).

218. Congressional Research Service, *U.S. Department of Education: Major Program Trends, Fiscal Years 1980-1989* (April 15, 1988) at 25. This decline was even greater than for education programs in general, which fell by 8 percent since 1980 when adjusted for inflation. *Id.* at 7.

219. Other, less significant changes proposed in the Administration's draft legislation included: elimination of the requirement that, to the extent possible, Title VII staff be bilingual; transfer of the authorization for bilingual-vocational training programs from the Vocational Education Act to Title VII; a new authorization for the Education Department to conduct studies to investigate "alternative methods or approaches of providing educational services to children of limited English proficiency"; and finally, establishment of a "funding priority" for programs serving students whose "usual" language is other than English. Given the limited appropriations for Title VII, this last provision would have been tantamount to an eligibility requirement; its likely effect would be to shift resources away from native-born LEP students, especially American Indian and Alaskan Native students, in favor of recently-arrived refugee and immigrant students.

220. Senate Subcommittee on Education, Arts and Humanities Hearings on Bilingual Education Amendments of 1981, Rept. 95-5550, at 4.

221. Both House and Senate versions of the Hawkins-Stafford Act eliminated separate grants for instructional materials development.

222. *Congressional Record*, April 20, 1988 at S 4367.

223. *See, e.g.*, D. Gold, "2 Languages, One Aim: 'Two-Way' Learning," *Education Week*, January 20, 1988 at 7.

224. J. Crawford, "Few Ask to Change *Lau* Plans," *Education Week*, June 4, 1986 at 15.

225. J. Crawford, "U.S. Enforcement of Bilingual Plans Declines Sharply," *Education Week*, June 4, 1986 at 1.

226. *Id.*

Chapter VIII

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1. The historical review presented in this Part is based on Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 Minn. L. Rev. 29 (1987).
2. *Id.* at 144.
3. *University of California Regents v. Bakke*, 438 U.S. 265 (1978) The Court actually made two decisions concerning the use of race in an admissions program: (1) that the Davis program was invalid and (2) that race may constitutionally be one of many factors in an admissions process seeking to create a diverse student body. Both determinations were by a 5-4 vote and Justice Powell was the only Justice in both majorities. The remainder of the Court was divided into two groups of four. The first group (Brennan, Marshall, White, and Blackmun) joined Justice Brennan's opinion holding that the Davis program did not violate the equal protection clause or federal civil rights laws (and therefore agreeing that race can be a factor in achieving diversity). The second group (Stevens, Stewart, Burger, and Rehnquist) offered no opinion on the constitutional question, but in an opinion by Justice Stevens concluded that the Davis program violated Title VI of the 1964 Civil Rights Act. These four Justices thus combined with Justice Powell to invalidate the Davis program.
4. 478 U.S. 421 (1986).
5. 107 S. Ct. 1053 (1987)
6. As is true of all the Court's affirmative action cases, within the majority of five Justices there were differing views on the reasoning supporting the judgment. In *Sheet Metal Workers* Justice Brennan wrote for a plurality of four (Brennan, Marshall, Blackmun, and Stevens) while Justice Powell wrote a separate, concurring opinion. In *Paradise* Justice Brennan again wrote for a slightly different plurality (Brennan, Marshall, Blackmun, and Powell) while Justice Stevens wrote a separate, concurring opinion.
7. In addition to the justification described in the text, the Court also endorsed affirmative action to achieve a statistical goal for the purpose of assisting a court faced with a recalcitrant defendant unwilling to comply with orders to cease discriminating. Under this justification, the affirmative action goal affords an approximation of the result of a nondiscriminatory process where the defendant refuses to adopt such a process. Thus, the district court has some assurance that the selection (of union members, state troopers, or college students) is made without racial discrimination and a benchmark against which progress can be easily measured. Although it may be an important remedial tool in specific cases, the "benchmark" affirmative action quota depends on a defendant that refuses to cease unlawful discrimination. It is therefore of limited use to justify more generally based affirmative action programs.
8. As suggested by the plurality in *Sheet Metal Workers*: Affirmative action "promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices." 478 U.S. at 450, quoting *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974)
9. In *Paradise* the absence of blacks at ranks above entry level were among "the effects of the Department's past discriminatory actions and of its failure to develop a [nondiscriminatory] promotion procedure." 107 S. Ct. at 1066, n. 20.
10. *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 474 (1986).
11. *United States v. Paradise*, 107 S.Ct. 1053, 1067 (1987).
12. 438 U.S. at 307.
13. 476 U.S. 267 (1986).
14. 476 U.S. at 276.
15. *Id.* at 274. As in all of the Court's affirmative action cases, there were differences among the five Justices forming a majority for the Court's judgment. Justice Powell's pronouncements on "societal discrimination" were expressly adopted only by Chief Justice Burger, Justice Rehnquist, and Justice O'Connor (*id.* at 288). Justice White, the fifth member of the majority, wrote a brief concurring opinion that did not discuss the issue.

16. While these cases usually involved the enforcement clause (section 2) of the Fifteenth Amendment, the approach developed in them would also apply to the enforcement clause (section 5) of the Fourteenth Amendment. The language of the two clauses is nearly identical, the Court has treated as coextensive the enforcement powers of the two amendments, and some of the Voting Rights Act cases relied on section 5 of the Fourteenth Amendment to determine the validity of the Act's provisions. *See, City of Rome v. United States*, 446 U.S. 156, 207-208, n. 1 (1980) (Rehnquist, J., dissenting).

17. The 1965 Act covered any state or political subdivision which used a "test or device" (including both literacy tests and other requirements of educational achievement) and in which less than 50% of voting-aged residents were registered or had voted in the last presidential election. Covered jurisdictions could bail out by establishing in a declaratory judgment action that the tests and devices had not been used during the previous five years to abridge the right to vote on racial grounds. *See, South Carolina v. Katzenbach*, 383 U.S. 301, 317-318 (1966)

18. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959)

19. *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

20. 395 U.S. 285, 297 (1969).

21. *Id.* at 293, n. 9.

22. *Oregon v. Mitchell*, 400 U.S. 112, 233 (1970) (Opinion of Brennan, J.).

23. *Id.* at 233.

24. *Id.* at 284 (Stewart, J., concurring and dissenting).

25. *Id.*

26. 448 U.S. 448 (1980).

27. An MBE was a business of which at least 51% was owned by minorities. Eligible minorities were Blacks, Hispanics, Orientals, Indians, Eskimos, and Aleuts. 448 U.S. at 454.

28. Justice Marshall, joined by Justices Brennan and Blackmun, relied on the approach of Justice Brennan's *Bakke* opinion. Chief Justice Burger, joined by Justices White and Powell, agreed that the statute was constitutional but declined to choose between the Powell or Brennan approaches in *Bakke*, holding that under either approach the statute was valid. Justice Powell also wrote a concurring opinion purporting to apply his *Bakke* approach.

29. The statute itself did not include findings of past discrimination and the statute's legislative history was rather sparse. Thus, the findings of past discrimination were derived from comments during the floor debate and from legislative reports concerning a similar set aside program administered by the Small Business Administration. These different sources of legislative history included references to past discrimination such as: "'historic practices that have precluded minority businesses for effective participation in public contracting opportunities'"; "'past discriminatory practices [that] have, to some degree, adversely affected our present economic system'"; and "'a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities'." 448 U.S. at 461, 465, 466, n. 48.

30. 448 U.S. at 528, 530,n. 12. (Stewart, J., dissenting).

31. To conclude that Congress has the power to remedy "societal discrimination" does not necessarily empower the legislature to employ affirmative action based on vague assumptions about general discrimination in society. It would be fully consistent with the enforcement clause power, and the cases interpreting it, to require that Congress articulate the particular type of discrimination it seeks to remedy. There is, for example, a significant distinction between a general legislative finding that there has been discrimination in society and a determination that widespread and longlasting discrimination in education justifies a federal remedy targeted on the victimized class. It is the latter model that has been followed in most remedies under the enforcement clauses and that provides ample authority for further remedial action to address the effects of inequality in education.

32. Exactly what Congress sought to accomplish is not completely clear. The legislative history of the statute and the *Fullilove* opinions are somewhat unclear on the effects Congress perceived. The most complete statement on this issue is found in Chief Justice Burger's summary of a Civil Rights Commission report on the participation of minorities and women in government contracting:

"Among the major difficulties confronting minority businesses were deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses." 448 U.S. at 467.

33. *Id.* at 541, n. 13.

34. *Id.* at 483.

35. *Wygant v. Jackson Bd. Educ.*, 476 U.S. 267, 283 & n. 11 (1986) (Opinion of Powell, J.).

36. *Gaston County v. United States*, 395 U.S. 285, 292 (1969).

37. 448 U.S. at 516.

Chapter IX

1. Bane & Wilson, *Equality in Higher Education*, 1980 p.2.
2. *Id*, p.3 *updated.*
3. *Id.*
4. *Id.*
5. *Id.*
6. Washington Post, August 30, 1988, p.21.
7. Bane and Wilson, p.24, *updated.*
8. *Id*, p.26.
9. *Id.*
10. Even for those enrolled in four year college programs there was major disadvantage within the system. A comprehensive identification of minority student enrollment in the prestigious "flagship" universities found underparticipation deemed "severe" in extent (Astin, *Minorities in American Higher Education* Jossey-Bass, 1982, p.138). Blacks, for instance, were found underrepresented in proportion to their overall college enrollment at 56 of 65 flagship universities (*id*, at 133).
11. Bane and Wilson p.28.
12. Among the 18.9 percent of 1980 high school seniors who later attained a bachelors degree, rates of degree receipt for low-middle, high-middle and highest students were respectively 6.9 percent, 11.3 percent, 21 percent and 39.3 percent, a five to one spread (Department of Education, Center for Education Statistics, Tabulation from High School and Beyond Survey).
13. Bane and Wilson, p.34.
14. *Id*; Hauptman and McLaughlin, *Is the Goal of Access to Postsecondary Education Being Met?* Aspen Institute 1988, Table 5.
15. *Education Week*, November 4, 1987, p.5.
16. Taylor, *Trends in Federal Policy Affecting Minority Participation in Higher Education* (unpublished manuscript prepared for Harvard University, 1987) p.6.
17. Spence, *The Minority Presence in Higher Education*, (unpublished manuscript prepared for Harvard University, 1987), p.3.
18. Spence, p.5.
19. Department of Education, Center for Education Statistics, Longtitudinal Studies Branch, *Highest Degree Attainment by 1980 High School Seniors*, 1987.
20. Astin, *Minorities in American Higher Education*, Jossey-Bass 1982, p.175.
21. Bane and Wilson, p.9.
22. Source: Bureau of the Census, P60, No. 156 (Aug. 1987), pp. 131-35.
23. Thus, blacks with a high school diploma, the census shows, earn an average of $9,000 a year, while those with the Bachelor's degree earn nearly $17,000 (*Chronicle of Higher Education*, Oct. 14, 1987.
24. Bane and Wilson, p.17.
25. *Id*, p.16.
26. *Id*, p.18.
27. *Id*, p.18.
28. *Equality Postponed*, p.82.

29. A major factor in the minorities drop from college enrollment to college graduation is the heavy concentration of minorities in two year community colleges. Thus, of Hispanic college students in California 85 percent are enrolled in community college (*id* at 80). In urban community colleges minorities represent 64.8 percent of all students enrolled (*Minorities in Urban Community Colleges*, American Association of Community and Junior colleges, 1987, p.12) --a seven fold overconcentration of minority students who represent about 10 percent of college enrollment (Astin, p.38).
30. *Equality Postponed*, p.108.
31. *Id*, p.113.
32. *Id*, vii.
33. Observing that upper middle class children average approximately four more years of schooling than children from lower status family background (Thomas, *Black Students in Higher Education* (1981) pp. 50-51, it has been noted that "the largest portion of that variance "derives from the fact that middle and upper class parents are able to provide their offspring with the type of skills, values and cultural and social experiences that schools value and subsequently reward." Similarly, among the strongest predictors of high school performance by students, (which is strongly linked with their prospects of college entry and completion) are such elements as parental income and parental education (Astin, pp. 94-95).
34. Wilson & Justiz, *Minorities in Higher Education*, Educational Record, (1987-1988) p.13.
35. Teachers and counselors may well determine students' college prospects by their role in decisions about grades, track placement and similar pre-college factors (Bane and Wilson, p.60). If teachers do not regard minority students as potential achievers, students are unlikely to become college material. It has therefore been urged that schools with low-income and minority students "set high expectations for those students' academic success and to act on the belief that such students can perform at high levels and meet rigorous high school graduation standards" (*Equality Postponed*, vii).
36. *Minorities on Campus: A Handbook for Enhancing Diversity*, (Washington, D.C. American Council on Education, 1989). In order to expand the pool of students who undertake college programs, the ACE handbook urges the need for a recruiting plan with numerical goals and timetables; suggests the need to work cooperatively with public schools to correct the conditions that inhibit many of their students; urges assessment instruments to help students to identify academic weaknesses and improve achievement at all levels before college; and suggests adaptation of junior high and high school curricula to college entry requirements, as well as provision of early information on college for junior and high school students.
37. Wilson & Justiz
38. New York Times, Section 4A, August 7, 1988, p.20.
39. *NCEOA Journal*, Volume 2 Issue 2, September 1987, p.4.
40. Burkheimer, Riccobono and Wisenbaker, *Evaluation Study of the Upward Bound Program, A Second Followup*, Research Triangle Park, N.C., Research Triangle Institute, 1979.
41. *Id.*
42. *NCEOA Journal*, 1987, p. 7.
43. *Id.* The high utility of appropriate pre-college intervention is also confirmed by recent operations of the privately funded "I Have a Dream" foundation. It provides a daily presence in the schools of trained persons who give help, tutoring, enrichment trips, and other supports for inner city children. In 1988 the first class of seventh graders in New York City who got foundation help, beginning in 1981, showed a remarkable high school graduation rate of 90 percent and 50 percent have chosen to go on to college.
44. Astin, p.142.
45. *Id.*
46. *Id.* at 145.
47. Richardson and Bender, *Fostering Minority Access and Achievement in Higher Education: The Role of Urban Community Colleges and Universities*, Jossey-Bass 1987, p.36.
48. *Id.*
49. *Id.* at 178-179.

50. *Minorities in Urban Community Colleges*, p.21.
51. Richardson and Bender, p. 181.
52. *Id.* at 83.
53. *Id.* at 216; It has been recommended that community colleges revitalize their transfer function by establishing a "transfer-college-within-a-college," wherein all students preparing for a baccalaureate can be brought together and exposed to the same kinds of intensive educational and extracurricular experiences commonly available to students at residential institutions" (*Equality Postponed*, 122).
54. Jackson, How Students Pay for College, *Higher Education*, Vol. 9, No. 5, September 1980.
55. National Longtitudinal Study of High School Class of 1972, 1976, Questions 24 and 38.
56. Jackson, *supra*.
57. ACE Newsletter, *Higher Education and National Affairs*, February 23, 1987.
58. *A Call For Clarity; Income, Loans, Cost*, American Association of State Colleges and Universities, 1988 p.17.
59. Kirschner and Thrift, *Access to College: The Impact of Federal Financial Aid Policies at Private Historically Black Colleges*, United Negro College Fund, Inc. p.16.
60. *Id.*
61. Mitchem, Preserving Educational Opportunities, *Point of View*, Congressional Black Caucus Foundation, Fall 1987, p.20.
62. Kirschner and Thrift, p.4.
63. Hauptman and McLaughlin, p.6.
64. Leslie and Brinkman, p.153.
65. Hauptman and McLaughlin, p.8.
66. Mitchem, p.21.
67. Spence, p.8.
68. Taylor, p.10.
69. Kirschner and Thrift, p.25.
70. Hauptman and McLaughlin, p.11.
71. Leslie and Brinkman, p.153.
72. *Id.*
73. ACE Cooperative Institutional Research Institute, *The American Freshman: National Norms for Fall 1986*. 74. As succinctly stated in a recent publication (Kirschner and Thrift, p.29) "because of the declining purchasing power of federal grants to low income students, students from the most needy families now must face large debt burdens in order to attend college. Often, students must assume debt larger than their families' annual income to pay college expenses. Understandably, some students see debt as an unacceptable risk, limiting their options for education...Examination of the demographic trends in American...points to a national policy of divestiture in the future of American youth. A renewed and greater investment in education is essential to assure an educated citizenry. Since about 1979, we have witnessed the implications of these trends. While a larger percentage of black and Hispanic youth are graduating from high school, their college going rate has declined sharply. If this trend continues we will be a less educated society in the year 2000."

Chapter X

1. *Digest of Education Statistics 1988*, U.S. Department of Education, Office of Educational Research and Improvement at 143, Tables 119 and 120.
2. *See Digest of Education Statistics 1988* at 192, Table 170.
3. "Sexual Harassment on Campus (article reprinted from 'On Campus With Women')" Project on the Status and Education of Women, Association of American Colleges (1985); *Journal of the National Association for Women Deans, Administrators and Counselors*, Winter 1983, Vol. 46, No. 2, Sexual Harassment on Campus.
4. "Peer Harassment, Hassles for Women on Campus," Project on the Status and Education of Women, Association of American Colleges, September, 1988.
5. "'Friends' Raping Friends, Could It Happen To You?" Project on the Status and Education of Women, Association of American Colleges, April 1987; "The Problem of Rape on Campus," Project on the Status and Education of Women, Association of American Colleges (1978).
6. *Digest of Education Statistics 1988* at 167, Table 142 and 195, Table 172.
7. *Digest of Education Statistics 1988* at 167, Table 142, and 195 and 198, Table 172.
8. Annual Report on the Economic Status of the Profession 1987-1988, *Academe*, American Association of University Professors.
9. U.S. Department of Education, Office of Educational Research and Improvement, Center for Education Statistics, 1987.
10. Salary information based on College and University Personnel Association, 1987-1988 Administrative Compensation Survey, Special Tabulations Prepared for the Office of Women in Higher Education, A.C.E., to be included in forthcoming Fact Book on Women in Higher Education.
11. *See generally* Moran, *Student Financial Aid and Women: Equity Dilemma?*, ASHE-ERIC Higher Education Report No. 5, 1986.
12. *Digest of Education Statistics 1988*, at 254-255, Table 220.
13. This long-standing gender gap in SAT scores flies in the face of the stated justification for the SAT which is that it is a valid predictor of first year college grades. Female freshmen consistently out-perform their male classmates in the classroom. Sex bias in standardized testing is an extremely serious concern.
14. *See e.g.*, "The Sports and Recreational Programs of the National Universities and Colleges," The National Collegiate Athletic Association, Report No. 6; Raiborn, *Revenues and Expenses of Intercollegiate Athletic Programs, Analysis of Financial Trends and Relationships 1981-85*, The National Collegiate Athletic Association, September 1986.
15. This is based on the research of R. Vivian Acosta, Ph.D. and Linda Jean Carpenter, Ph.D., J.D., Professors at Brooklyn College of the City University of New York.
16. *See* "Colleges Perplexed About Status of Health Insurance for Students in Wake of New Civil Rights Law," *The Chronicle of Higher Education*, October 5, 1988, at A25.
17. *Hearing on H.R. 3660, The Act for Better Child Care Service Before the Subcomm. on Human Resources of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 241 (1988) (Statement of Nancy Duff Campbell).
18. *Digest of Education Statistics 1988* at 143, Table 119.
19. Title IX shares this jurisdictional provision with Title VI, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the Age Discrimination Act, 42 U.S.C. §§ 6101. It applies in the same fashion to all four statutes.
20. Title IX contains certain exemptions affecting institutions of higher education. For example, it does not prohibit sex discrimination in admissions by public undergraduate institutions which have been traditionally single-sex or by private undergraduate schools. Further, religiously controlled schools are exempt from particular Title IX requirements if compliance would violate a religious tenet of such controlling religious organization. Military institutions are entirely exempt from Title IX.
21. 34 C.F.R. §§ 106.51, 106.61.

22. 34 C.F.R. §§ 106.21 and 106.39-106.40. As a result of an amendment to the Civil Rights Restoration Act, see discussion, *infra*, Title IX does not prevent covered institutions from refusing to provide abortion coverage although it does prohibit discrimination on the basis of abortion and does require health coverage for complications of abortion to the extent there is coverage for other illnesses or temporary disabilities.
23. 34 C.F.R. §§ 106.37 (c), 106.41.
24. 34 C.F.R. § 106.31(b).
25. 34 C.F.R. § 106.3.
26. *Cannon v. University of Chicago*, 441 U.S. 677 (1979).
27. *See, e.g., Budget of the United States Government, Appendix,* Fiscal Year 1987, Executive Office of the President, OMB, I-I14.
28. *See, Generally, Oversight Review of the Department of Labor's Office of Federal Contract Compliance Programs and Affirmative Action Programs: Hearing before the Subcomm. on Employment Opportunities of the Comm. on Education and Labor of the House of Representatives,* 99th Cong., 1st Sess. (1985).
29. *See* discussion below in "Failures of Enforcement."
30. As discussed above, the same question applied to Title VI, Section 504 and the Age Discrimination Act.
31. *See, e.g., Haffer v. Temple,* 688 F.2d 14 (ed Cir. 1982); *Bossier Parish School Board v. Lemmon,* 370 F.2d 847 (5th Cir. 1967); *Wort v. Vierling,* No. 82-3169 (C.D. Ill., May 28, 1982); *Wright v. Columbia University,* 520 F.Supp. 789 (E.D. Pa. 1981); *Poole v. South Plainfield Bd. of Education,* 490 F.Supp. 948 (D. N.J. 1980).
32. These cases are described in Beier and Greenberger, *Federal Funding of Discrimination: The Impact of Grove City College v. Bell,* National Women's Law Center (1987) [hereinafter *Federal Funding of Discrimination*].
33. *See generally Federal Funding of Discrimination* for a discussion of complaints immediately dismissed on *Grove City* grounds.
34. *AAUW v. Department of Education* became embroiled in standing issues similar to those in *Adams* and *WEAL* (see below). Plaintiffs voluntarily dismissed the suit in December of 1987.
35. The administration initially gave some hope for elementary and secondary education by stating that receipt of federal Chapter 2 funds or Federal Impact Assistance, which elementary and secondary schools may use for a very broad range of purposes, would give OCR jurisdiction over the entire elementary and secondary program. However, even this reading did not survive internal review in the Department of Education. By October of 1985, the notion of broad coverage conferred by Chapter 2 was explicitly disavowed by the Civil Rights Reviewing Authority in its decision in *In the Matter of Pickens County School District.* Within the year, jurisdiction conferred by impact aid was similarly limited in a second reviewing authority decision, *In the Matter of Lauderdale County School District.*
36. See memorandum from Singleton, Assistant Secretary for Civil Rights, to Regional Civil Rights Directors, Re: Guidance on the Application of *Grove City College v. Bell* to OCR Enforcement Activities in Post-secondary Institutions, Dated November 22, 1985.
37. See, memorandum from Harry M. Singleton, Assistant Secretary for Civil Rights, to Regional Civil Rights Directors, Re Jurisdiction to Investigate Complaints Involving Student Health Insurance, Dated November 22, 1985.
38. See, Federal Funding of Discrimination for a summary of OCR complaints dismissed on *Grove City* grounds.
39. University of California at Davis Medical School, #09852085.
40. Northeastern University, #01-84-2020.
41. See, e.g., Jefferson State Junior College, #04852058; Birmingham Southern College, #04852055.
42. See, e.g., University of Alabama, #04-79-2098; Gonzaga University, #10-80-2016.
43. *Adams and WEAL* (Transcript of the Court's Findings of Fact and Conclusions of Law, March 15, 1982).
44. *Adams and WEAL* Order, March 10, 1983 at 2, para. iv.

45. *Investigation of Civil Rights Enforcement by the Department of Education: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 72 (1985) [hereinafter *House Committee on Government Operations Hearings*] (Statement of Marcia Greenberger).
46. *Civil Rights Enforcement by the Department of Education: Hearing Before a Subcommittee of the House Comm. on Government Operations*, 100th Cong., 1st Sess. 61-67 (1987) (Statement of Marcia Greenberger).
47. H. Rep. No. 99-458, 99th Cong., 1st Sess. (1985) (*Investigation of Civil Rights Enforcement by the Office for Civil Rights at the Department of Education: Twenty-fourth Report by the Committee on Government Operations*) [hereinafter *Report: House Committee on Government Operations*].
48. *Id.* at 3.
49. *House Committee on Government Operations: Hearings*, at 71-72.
50. *Id.*
51. *Report: House Committee on Government Operations*, at 27-28.
52. *Id.* at 28.
53. *Id.* at 11-18.
54. *Id.*
55. *Id.* at 6-11.
56. *Id.* at 32.
57. *Id.* at 30-31.
58. *Id.* at 18-22.
59. *House Committee on Government Operations: Hearings* at 71-72.
60. H.Rep. 100-56, 100th Cong., 1st Sess. (1987) (*Investigation of the Office for Civil Rights on the Department of Health and Human Services: Fifth Report by the Committee on Government Operations*).
61. *Id.* at 16.
62. *Id.* at 5-12.
63. *Id.* at 20-22.
64. *Id.* at 12-16 and 22-27.
65. Telephone conversation, October 27, 1988, with Sara Kalterborn, Dept. of Justice.
66. *Report: House Committee on Gov't Operations*, at 2-3 and 6.
67. United States General Accounting Office, *Equal Employment Opportunity: EEOC and State Agencies Did Not Fully Investigate Discrimination Charges* (Oct. 1988) (GAO/HRD-89-11).
68. Final Report No. 04-86-079-04-410.

Chapter XI

1. Report of the Committee on Abiliting Testing, Assembly of Behavioral and Social Sciences, National Research Council, "Ability Testing: Uses, Consequences, and Controversies", Vol I, pp. 71-73, Wigdor and Garner, Editors, National Academy Press (Washington, D.C. 1982); "Interim Report: Within Group Scores of the General Aptitude Test Battery", p. 40, Committee on the General Aptitude Test Battery of the Commission on Behavioral and Social Sciences and Education, National Research Council, Wigdor and Hartigan, Editors, National Academy Press (Washington 1988 [?]); Cronbach, L. J. "Essentials of Psychological Testing". p. 321 (4th Ed.), Harper & Row, (1984).
2. "Ability Testing: Uses, Consequences and Controversies", op. cit. at p. 72.
3. Gottfredson, "Societal Consequences of the *g* Factor in Employment", 29 Journal of Vocational Behavior 379 (December, 1986).
4. Gottfredson, "Societal Consequences of the *g* Factor in Employment", *supra*, 29 Journal of Vocational Behavior at 400-401.
5. "Ability Testing: Uses, Consequences, and Controversies", Op. cit. at p. 73.
6. At least when ranking people for referral, the employment services have for a number of years been using different, race based scores on an interim basis. See, "Interim Report: Within Group Scoring of the General Aptitude Test Battery", op. cit. The controversy over the proper use of that test battery has not yet been resolved.
7. *See*, Friedman and Williams, "Current Use of Tests for Employment", in *Ability Testing: Uses, Consequences and Controversies*, Ed. by Wigdor and Garner, National Academy Press (Washington, D.C., 1982).
8. 401 U.S. 424 (1971).
9. 401 U.S. at 430-432.
10. S. Rep. No. 415, 92d Cong., 1st Sess. 5, 14-15 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 20-22, 37 (1971); *Connecticut v. Teal*, 457 U.S. 440, 449-50 (1982).
11. Blumrosen, "The Legacy of *Griggs*: Social Progress and Subjective Judgments", 63 Chicago-Kent L. Rev. 1 (1987).
12. Chambers and Goldstein, "Title VII at Twenty: The Continuing Challenge," The Labor Lawyer, 235, 245-246 (198).
13. 28 C.F.R. 50.14 (Justice); 29 C.F.R. 1607 (EEOC); 41 C.F.R. 60-3 (Labor); and 5 C.F.R. 300:103 (c) (Office of Personnel Management, formerly Civil Service Commission); 43 Fed. Reg. 38290 (1978). Under Title VII, the Uniform Guidelines have the force and effect of regulations only with respect to their record keeping provisions, because EEOC does not have substantive rule making power. See, Secs. 706 and 709(c), 42 U.S.C. 2000e-5 and e-8(c).
14. See, 45 Fed. Reg. 29530 (May 2, 1980).
15. *EEOC v. Atlas Paper Co.*, Civil No. 1-83-251, E.D. Tenn., rev'd No. 87-5421, Feb. 17, 1989.
16. Brief for the United States in No. 86-6139, O.T. 1987, filed November 13, 1987.
17. Brief, pp. 17-25.
18. Brief, pp. 26-28.
19. See, Sec. 6 of the Uniform Guidelines, 29 C.F.R. 1607.6.
20. *Watson* v. Fort Worth Bank & Trust, No. 86-6139, June 29, 1988.
21. Slip Op. Parts II C and D, pp. 10-18.
22. See, Slip Op., pp. 16-17.
23. Brief for the United States in *Wards Cove Packing Company v. Antonio*, No. 87-1387, filed Sept. 9, 1988.
24. Sections 5A and 6B, 29 C.F.R. 1607.5A and 6B.
25. 43 Fed. Reg. 38291 at 17.

Chapter XII

1. This statutory prohibition against citizenship discrimination is complex because it applies only to persons deemed "intending citizens" under IRCA. Aside from paperwork requirements, this restriction generally means that IRCA's protection against citizenship discrimination extends only to persons admitted for permanent residence, persons granted temporary resident status under IRCA's legalization program, and persons admitted as refugees or granted asylum in the United States. Notably and inexplicably excluded from this defined class of "intending citizens" are persons granted temporary resident status under IRCA's Seasonal Agricultural Worker or "SAW" program, which legalizes certain persons who worked in American fields in 1985 or 1986; also unprotected are persons authorized to work in the United States under certain non-immigrant visas.
2. Like that in Title VII, IRCA's prohibition against national origin discrimination applies to all persons authorized to work in the United States, "intending citizen" or not. No court has yet decided whether enactment of IRCA's employer sanctions provision implicitly retracted Title VII's protection of undocumented workers from race, sex, national origin, or other forms of discrimination. *Cf. Rios v. Enterprise Ass'n Steamfitters Local Union 638*, No 87-6043 (2d Cir. November 3, 1988) (upholding Title VII award to undocumented aliens based on claims arising before IRCA was enacted).
3. As noted above, IRCA and Title VII each have jurisdiction over different types of immigration-related discrimination, and the overlap can be confusing to persons who have been discriminated against. According to an interim Memorandum of Understanding finally entered into in April 1988, a year and a half after IRCA was enacted, the EEOC and the OSC now coordinate so that when the OSC receives charges of discrimination within the EEOC's jurisdiction under Title VII (charges of national origin discrimination against employers with more than 15 employees), it refers them to the EEOC, and when the EEOC receives charges that are within the OSC's jurisdiction under IRCA, it refers them to the OSC.
4. The Study did document a substantial degree of "selective screening"--7 percent of all employers admitted to requiring additional documentation (that is, more than required by IRCA) from persons seen as risky.
5. This was confirmed by the other half of the New York Study, a survey of immigration and refugee counseling organizations in and around New York City. Of the 46 organizations contacted, some 54 percent reported direct experience with employment discrimination seemingly caused by fear of sanctions. Some 57 percent of those persons reporting such problems to the responding organizations were refugees or asylees who had difficulty finding work for lack of "official looking" documentation. The other 43 percent were persons seeking legal status under IRCA's legalization program, who also reported widespread problems with employers refusing to hire them for lack of "official" documentation, even though the documents presented were legally sufficient under IRCA.
6. The GAO was able to make this distinction, of course, in reviewing the charges of discrimination that had been filed with the Office of Special Counsel, for those charges must contain information about the charging party's authorization to work in the United States. The GAO concluded that these charges also failed to provide sufficient information about the discriminatory effect of sanctions, however, because of the relatively small number of charges that have been filed to date with the OSC. The GAO made no findings about whether these numbers were due to the OSC's lack of offices outside of Washington, D.C.
7. For example, the Department initially required that, before a person was deemed an "intending citizen" and therefore protected by IRCA's prohibition against citizenship discrimination, he or she must have filed a particular form, I-772 "Declaration of Intending Citizen." Because of predictable confusion about where and when to file this form, the Department now deems persons to be protected from the time they achieve an "intending citizen" status, and requires only that the form be filed at or before the time a charge of discrimination is filed with the OSC.
8. *See Connecticut v. Teal*, 457 U.S. 440 (1982); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
9. *Compare* IRCA, 8 U.S.C. § 1324b(a)(1), (d)(2) *with* 28 C.F.R. §44.200(a).

10. *See League of United Latin American Citizens v. Pasadena Independent School District*, 662 F. Supp. 443, 449 n.6 (S.D. Tex. 1987).

11. *See* 52 Fed. Reg. 37,405 (October 6, 1987).

Chapter XIII

1. Amended in 1978 (P.L. 95-256) and in 1986 (P.L. 99-592), the ADEA is codified at 29 U.S.C. 621.
2. *Mature Outlook* (Feb. 1988) at 9.
3. 42 U.S.C. § 6101.
4. 45 C.F.R. § 90 (1979).
5. Senior organizations challenged these weakened regulations. The D.C. Circuit, however, upheld the secretary's actions in part on the basis of an Office of Management and Budget directive issued outside of the Administrative Procedure Act, 5 U.S.C. § 551. *Action Alliance of Senior Citizens of Greater Philadelphia v. Bowen*, F.2d 1449 (D.C. Cir. 1988) (Chief Judge Wald, *dissenting*
6. A total of 256 complaints were reported in fiscal year 1986, the last reporting period. *Report to Congress on the Implementation of the Age Discrimination Act of 1975 during Fiscal Year 1986* (Department of Health and Human Services) (draft version).
7. P.L. 90-202.
8. *See* Section 2 of the ADEA, 29 U.S.C. 621 (4) (b).
9. Included in the Act are exceptions to the prohibitions on age discrimination which allow age-based decisions when certain conditions are met. Regulations provide that employers may enforce the terms of bona fide seniority systems, if those systems use length of service as criteria for job and promotion allocation. Likewise, a bona fide occupational qualification that is "reasonably necessary to the normal operation of the particular business" and thereby makes distinctions based on age is permitted in limited circumstances. Exceptions of this nature are to be narrowly construed. *See* Regulations at 29 C.F.R. § 1625.6 and 1625.8.
10. S. 2117, P.L. 100-283 (Apr. 7, 1988). The legislation, sponsored by Senator Melcher, is set out at 134 Cong. Rec. S2477 (daily ed. Mar. 17, 1988).
11. EEOC Delays in Processing Age Discrimination Charges: Hearing before the House Committee on Government Operations, 100th Cong., 2d Sess. (Mar. 29, 1988); Statement issued by Senate Special Committee on Aging (Apr. 11, 1988).
12. EEOC Birmingham Office Closed Discrimination Charges without Full Investigation: GAO Report to House Committee on Education and Labor (July 15, 1987).
13. Hearing before the Senate Committee on Labor and Human Resources, 100th Cong., 2d Sess. (May 24, 1988) (remarks of Sen. Melcher).
14. 1987 Hearings, *supra*, at 75-79 (statement of Alice Quinlan, Public Policy Director, Older Women's League).
15. EEOC Litigation Reports for 1986 and 1987.
16. *Enforcement of the ADEA*, Report of the House Committee on Education and Labor, 99th Cong., 2d Sess. (1986).
17. The 150-Day Rule was designated as such in the EEOC's written response to additional questions posed by Senator Melcher subsequent to the 1987 Hearings, *supra* (Hearing Record, at 243, Answer to Question 11). When queried on this 150-Day Rule, Chairman Thomas denied the existence of such a rule at a subsequent hearing. Age Discrimination: Quality of Enforcement, Hearings before the House Select Committee on Aging, 100th Cong., 2d Sess. (Jan. 28, 1988).
18. Age Discrimination: Quality of Enforcement: Hearings before the House Select Committee on Aging, 100th Cong., 2d Sess. 103 (Jan. 28, 1988).
19. EEOC's Performance in Enforcing the Age Discrimination in Employment Act: Hearings before the Senate Special Committee on Aging, 100th Cong., 2d Sess. (June 24, 1988) (submitted statement of Howard Rhile, Assoc. Director, Information Management and Technical Division, GAO). This is true despite EEOC management assertions that computer automation in many district offices leaves the EEOC in command of its charge date. *Id.* (submitted statement of Michael O'Dell, Social Science Analyst, on detail from the GAO).
20. 29 C.F.R. 860.120(f) (1) (iv) (B).

21. Letter of Jeffrey Zuckerman to Orin Hatch, Chairman, Senate Committee on Labor and Human Resources, March 17, 1986.

22. *American Assn. of Retired Persons v. EEOC*, 655 F. Supp. 228 (D.D.C. 1987), rev'd. 823 F.2d 600 (D.C. Cir. 1987).

23. *Quinn v. New York State Elec. & Gas Corp.*, 569 F. Supp. 655 (N.D. N.Y. 1983).

24. EEOC tape recording of Commission Proceedings, July 27, 1987.

25. *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986) (*en banc*).

26. *Cipriano v. Board of Education*, 785 F.2d 51 (2d Cir. 1986).

27. *Twenty Years of the Age Discrimination in Employment Act: Success or Failure?* Hearings before the Senate Special Committee on Aging, 100th Cong., 1st Sess. 579-606 (Sept. 10, 1987) (1987 Hearings).

28. *Paolillo v. Dresser Industries, Inc.*, 821 F.2d 81 (2d Cir. 1987).

29. The prior decision of the same panel had placed the burden of proof on key issues on the employer. 43 Fair Empl. Prac. Case. (BNA) 338,341 (Mar. 10, 1981).

30. *Lusardi v. Lechner*, No. 87-5901 (3d Cir. Aug. 31, 1988).

31. *Id. See also*, 1987 Hearings, *supra*, at 205 (Statement of R. Gaull Silberman, Vice Chairman, EEOC). *See contra* authority generally, *Karlen v. City Colleges of Chicago, et al.*, 837 F.2d 314 (7th Cir. 1988); *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

32. *Id.* at 73. (Statement of Alice Quinlan, Public Policy Director, Older Women's League).

33. *Id.* at 167. (Chronology of ADEA Policy Development by EEOC: Early Retirement Programs--Voluntary/Involuntary).

34. Age Discrimination in Employment Act--Waiver of Rights: Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 100th Cong., 2d Sess. 112-115 (May 24, 1988) (Statement of Fred W. Alvarez, Asst. Secretary for Employment Standards Administration).

Chapter XIV

1. Women's Bureau, Office of the Secretary U.S. Dept. of Labor, Fact Sheet No. 88-2, 1 (1988) [hereinafter *Twenty Facts on Women Workers*].
2. *Working Women, Past, Present, and Future* at 40 K. Koziara, M. Moskow & L. Tannereds, Bureau of National Affairs (Washington, D.C.) 1987.
3. U.S. Dept. of Labor, Bureau of Labor Statistics, Report No. 756, Employment in Perspective: Women in the Labor Force: Employment of Women in Nontraditional Jobs, (1988).
4. "Occupational Segregation: Understanding the Economic Crisis for Women", Women Employed Institute, Chicago, Illinois (1988) at 5. [hereinafter cited as "Occupational Segregation"].
5. J. Malveaux, *Low Wage Black Women: Occupational Descriptions, Strategies for Change*, 8, 12-13 (1984) (unpublished paper prepared for the NAACP Legal Defense and Education Fund, Inc.) [hereinafter *Low Wage Black Women*].
6. U.S. Department of Labor, Women's Bureau, Time of Change: 1983 Handbook on Women Workers [hereinafter cited as Time of Change]. p.29.
7. U.S. Bureau of the Census, Current Population, Sries P-60, No. 161, *Money, Income and Poverty Status in the United States*, 1987. p.1 (1988). (Advance Data from the March 1988 Current Population Survey).
8. *Women's Work, Men's Work Sex Segregation on the Job*, B. Reskin & Hartman, eds. 1986 [hereinafter *Women's Work*].
9. "Occupational Segregation" at 2.
10. *Id.*
11. *Id.* at 4.
12. *Id.* at 2.
13. U.S. Bureau of the Census, Current Population Reports, Series P-60, No. 161, *Money Income and Poverty Status in the United States: 1987* at 1, 7-8 (1988) (Advance Data from the March 1988 Current Population Survey).
14. Swinton, *Economic Status of Blacks*, 1987 in The State of Black America, 1988, J. Dewart ed. (1988), at 147.
15. *Id.*
16. *Id.* Thus, black workers are less likely to be in agriculture, forestry and fishing; mining; construction; durable manufacturing; wholesale trade; retail trade; and finance, insurance and real estate.
17. *Id.* at 147-148 (table 9: Distribution of Employed Population in Major Occupational Categories by Race and Sex 1986.) "Employment and Earnings, January 1987. U.S. Department of Labor, Bureau of Labor Statistics." The highest percentages of black men are found in the following occupations: precision, craft, and repair (16); operatives, assemblers and inspectors (11 percent) transport operatives and material movers (10.8 percent); and handlers, cleaners and helpers (13.4 percent).
18. *Id.* at 11.
19. Policy Analysis Center, National of La Raza, *Hispanics in the Workforce: Part I,* Washington, D.C., (1987) at 6, 11.
20. *Id.* at 14.
21. W. Johnson & A. Packer *Workforce 2000: Work and Workers for the Twenty-first Century* at 85 [hereinafter *Workforce 2000*].
22. *Id.* at 89, (Table 3-5). This is in contrast to whites, where men outnumber women by almost three to two.
23. *Id.* at 97-98.
24. Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e, *et seq.*

25. The provisions of Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended, cover all companies and agencies that have contracts with the federal government of $10,000 or more, their subcontractors, and recipients of federally assisted construction contracts.

26. 41 C.F.R. 60 -1.40 (1988)

27. The Civil Rights Act of 1957 P.O. 85-315, 71 Stat. 634 (codified as amended in various sections of the U.S. Code).

28. The Department of Justice may bring suit against federal contractors believed to be in violation of the Executive Order 11246, as amended. These cases may come as a referral from the Department of Labor's Office of Contract Compliance Programs or from an investigation initiated by the Department of Justice.

29. Executive Order 12250 (November 2, 1980) authorizes the Department of Justice to coordinate activities related to ending discrimination in federally assisted or federally conducted programs. To the extent that this coordination and reviewing authority is directed at regulations, policies and standards for enforcement action, investigations and compliance reviews, it may implicate employment discrimination issues and require consultation with the EEOC under Executive Order 12067. Executive Order 12067 gives the EEOC authority to coordinate the EEO activities of other agencies including development of standards, procedures and policies for enforcement.

30. United States Commission on Civil Rights, *To Eliminate Employment Discrimination: A Sequel* (1977) [hereinafter 1977 Civil Rights Commission Report]. *See* Local 189, *United Papermakers v. United States*, 415 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *United States v. Local 36 Sheet Metal Workers*, 416 F. 2d 123 (8th Cir. 1969); in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

31. 407 F.2d 1047 (5th Cir. 1969)

32. 1977 Civil Rights Commission Report at 277 n.76 (quoting a memorandum of the Chief of the Employment Section).

33. *Id. E.g.*, *United States v. Local 86, Ironmakers*, 443 F.2d 544 (9th Cir. 1971).

34. *See* 1977 Civil Rights Commission Report *supra* note 35, at 277 n.76.

35. For example, in *Connecticut v. Teal*, 457 U.S. 440 (1982), a case in which the plaintiffs alleged that a written examination required by the state had a discriminatory effect, the Court specifically noted that the Government's brief was submitted by the Department of Justice but was not joined by the Equal Employment Opportunity Commission which traditionally shared responsibility for federal enforcement of Title VII with the Department. The Justice Department joined the case on the side of the state defendants, arguing that the employees had not made a sufficiently strong showing under *Griggs* to require the state to justify the adverse impact. Norman Amaker, *Civil Rights and the Reagan Administration*, (Washington, D.C.: The Urban Institute, 1988) at 125.

36. *Oversight Hearing on Equal Employment Opportunity and Affirmative Action: Hearings before the Subcomm. on Employment Opportunities*, 97th Cong. 1st Sess. 5, 13-17 (1981) [hereinafter *1981 Oversight Hearings*]. *See also* Address by William Bradford Reynolds, Fourth Annual Conference on EEO, *reprinted in Remarks of William Bradford Reynolds before the Fourth Annual Conference on EEO*, in Recent Developments in Federal Regulations and Case Law 1981.

37. *1981 Oversight Hearings*, at 131-156.

38. *See* Tenth Annual Conference at 12; *1981 Oversight Hearings*, *supra* note 35, at 11 Remarks of William Bradford Reynolds, Delaware Bar Association 6 (Feb. 1982).

39. *See, e.g.*, *Bratton v. City of Detroit* 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 703 (1984) and *Boston Chapter NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982), *cert. granted*, 103 S.Ct. 293, *cert. vacated*, 103 S.CT. 2076 (1983).

40. Section 706(g), 42 U.S.C. § § 2000e-5(g).

41. Section 717(b)(1) of Title VII, 42 U.S.C. § 2000e-16(b).

42. 438 U.S. 265 (1978).

43. 443 U.S. 193 (1979).

44. *Id*. 443 U.S. at 204.

45. 448 U.S. 448 (1980). On January 23, 1989, in a decision generally regarded as a step backwards for affirmative action, the Supreme Court invalidated an affirmative action plan that gave preferential treatment to minority subcontractors vying for the city construction business. The Court found that the city had failed to develop an adequate factual predicate to identify the past discrimination in the city's construction industry that would authorize race-based relief under the 14th Amendment's Equal Protection Clause, *J.A. Croson v. City of Richmond*, U.S. L.W. (January 23, 1989).

46. *Daily Labor Report BNA*, May 24, 1985, at A-10

47. *Deveraux v. Geary*, 765 F.2d 268 (1st Cir.) *cert. denied*, 106 S. Ct. 3337 (1986); *United States v. Buffalo*, 779 F.2d 881 (2nd Cir.), *cert. denied*, 106 S. Ct. 3333 (1986); *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 753 F.2d 1172 (2d Cir. 1985), *aff'd* 478 U.S. 421, (1986); *Pennsylvania v. Local 542, Operating Engineers*, 770 F.2d 1068 (3rd Cir.), *cert. denied*, 474 U.S. 1060 (1986); *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3d Cir. 1984), *cert denied*, 469 U.S. 1107 (1985); *Vanguards of Cleveland v. City of Cleveland*, 478 U.S. 501, (1986); *Van Aken v. Young*, 750 F.2d 43 (6th Cir. 1984); *Britton v. South Bend Community School Corporation*, 775 F.2d 794 (7th Cir. 1985), *reh. granted and judgment vacated on other grounds* 783 F.2d 105 (1986); *Grann v. City of Madison*, 738 F.2d 786 (7th Cir. 1983), *cert. denied*, 469 U.S. 918 (1984); *Diaz v. American Telephone and Telegraph*, 752 F.2d 1356 (9th Cir. 1985); *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985, *aff'd subnom. United States v. Paradise*, 480 U.S. 149 (1987).

48. Hearings on the Reynolds Nomination, at 263 (statement of Lawyers' Committee for Civil Rights Under the Law).

49. 467 U.S. 267 (1986).

50. There was no requirement that this finding of discrimination be made by a court of law. All that is required is that the employer have "a strong basis in evidence" for pursuing remedial action. *Id.*

51. 478 U.S.501 (1986).

52. 478 U.S. 421 (1986).

53. The particular plan: (1) must be necessary to remedy egregious discrimination or the lingering effects of past discrimination; (2) must be applied flexibly and not simply to achieve and maintain racial balance; (3) must be a temporary measure scheduled to terminate when the goals are met and the court finds it is no longer needed to remedy past discrimination; and (4) must contain goals that do not unnecessarily trammel the interest of innocent third parties.

54. 480 U.S. 149 (1987).

55. 480 U.S. , 107 S.Ct. 1442 (1987).

56. 340 F.Supp. 703, (M.D. Ala 1972). For thirty-seven years there had never been a black trooper at any rank.

57. *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974).

58. *Paradise v. Prescott*, 767 F.2d 1514, 1533 (11th Cir. 1985)(quoting 585 F. Supp. at 75). The district court judge had concluded that:

> It is now years later and this court will not entertain the excuse that the department is now without legal authority to meet its obligations under the consent decrees. . . . [T]he Department of Personnel, which is also a party to these proceedings, assured the court at the January 5, [1984] hearing that it would work closely with the Public Safety Department to develop acceptable promotion procedures. The Public Safety Department's contention that it is without legal authority is not only meritless, it is frivolous.
>
> Moreover, that the Department of Public Safety would even advance this argument dramatically demonstrates the need for the relief imposed by this court. Such frivolous arguments serve no purpose other than to prolong the discriminatory effects of the department's 37-year history of racial discrimination. *Paradise v. Prescott*, Civ. Action No. 3561-N (MD Ala., Jan. 13, 1984)

59. 480 U.S., 107 S.Ct. 1442 (1987).

60. Indeed, *none* of the 238 positions in the pertinent Skilled Craft Worker job classification, which included the dispatcher position at issue, was held by a woman. *Id.* at 1446.

61. 806 F.2d 1144 (2d Cir. 1986), cert. granted, 107 S.Ct. 2177, *amended*, 107 S.Ct. 3182 (1987); *aff'd*, 108 S. Ct. 586 (1988).

62. *See New York Times*, August 13, 1986, at B8.

63. The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987).

64. 43 Fed. Reg. 38290 (August 25, 1978).

65. 401 U.S. 424 (1971).

66. 108 S.Ct. 2777 (1988).

67. 827 F.2d 439 (9th Cir.), *cert granted*, 108 S. Ct. 2896 (1988). The case involves the following issues: 1) what is the nature and extent of statistical evidence necessary to prove discrimination when subjective criteria are used to make employment decisions; 2) the nature of the burden of proof on the defendant in such a case, and 3) whether plaintiffs will be able to challenge the cumulative effects of a variety of employment practices under the disparate impact theory.

68. Brief *Amicus Curiae* of the United States Supporting Petitioners *Wards Cove Packing Company, v. Atonio* No. 87-1387 (1988 term).

69. Letter from W. Bradford Reynolds to J. Clay Smith, Acting Chairman of the EEOC.

70. The other agency was the National Endowment for the Humanities, later joined by the Department of Education after William Bennett left NEH as Director and became Secretary of the Department of Education.

71. Authority to enforce the Equal Pay Act was transferred to the EEOC from the Department of Labor pursuant to Reorganization Plan No. 1, 3 C.F.R. 321 (1978) during the Carter Administration.

72. The Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 (1985).

73. Order No.12,067 § 1-201 (June 30, 1978).

74. 17 EEOC Ann. Rep. 31, (1983).

75. The nominee, William Bell, was a black Republican from Detroit, Michigan who wan an executive search firm. Editorial, "Reconsider the Choice for EEOC," *Wash. Post*, Nov. 1981; *see also* Maudine Cooper testimony before the Senate Committee on Labor and Human Resources on behalf of the Leadership Conference on Civil Rights (1981).

76. *See Hearing to Reconsider the Renomination of Clarence Thomas to be Chairman, EEOC*, 98th Cong., 1st Sess., 807 (1986) Joint Testimony of Civil Rights and Women's Organizations. The concerns included the Commission's continuing attacks on the Uniform Guidelines for Employee Selection Procedures, the mixed signals regarding the use of goals and timetable, the decrease in class action suits filed, and overall management of the Commission by Mr. Thomas.

77. Mr. Connolly generated concern based on three specific issues: When Connolly's former employer, General Motors, began negotiation with the EEOC of a longstanding case, Connolly appointed his own special assistant rather than the Deputy General Counsel to fill in for him. *See Justice Denied: The Equal Employment Opportunity Commission Under the Reagan Administration*, Women Employed Institute (February 1986) [hereinafter *Justice Denied*]. In April of 1982 he reassigned nine of his senior attorneys, six of them black, with two days notice and without informing the Chair of the Commission of his actions. Mr. Connolly labelled his actions "a reorganization"; his critics called it political housecleaning. *See* "EEOC Senior Attorneys Get Transfer Order," *Legal Times*, Apr. 19, 1982. Finally, he generated further criticism when in a speech to EEOC attorneys from around the country he discussed what were interpreted as future policy changes. The changes included narrowing the scope of sexual harassment cases, discouraging age discrimination lawsuits, moving away from class action suits, and halting comparable worth investigations. Connolly said that he was talking about his own "philosophy," not policy changes, but this assertion was contradicted by many of those who heard him speak. "Quarreling at the EEOC," *Wash. Post*, Jan. 20, 1982.

78. Slate resigned after a confrontation with Chair Clarence Thomas over his criticism in an internal memo of Thomas' system for handling the processing of cases. "Improper Handling of EEOC Cases Charged," *Wash. Post*, Feb. 8, 1984.

79. 729 F. 2d 1554 (1984) (*en banc*), *cert.*, 92 L.Ed.2d *See* Letters from EEOC Chairman Clarence Thomas to Attorney General William French Smith, January 26, 1983; March 21, 1983. In the *Williams* case, the Department of Justice argued that hiring one black for each white hired, as proposed in the consent decree in question, violated Title VII because it benefitted blacks as a class and not identifiable victims of discrimination. Justice's position would have endangered EEOC conciliations and consent decrees and was contrary to the EEOC's own guidelines on af-

firmative action.

80. *See* Letters from EEOC Chairman Clarence Thomas to Attorney General William French Smith, January 26, 1983; March 21, 1983. In the *Williams* case, the Department of Justice argued that hiring one black for each white hired, as proposed in the consent decree in question, violated Title VII because it benefitted blacks as a class and not identifiable victims of discrimination. Justice's position would have endangered EEOC conciliations and consent decrees and was contrary to the EEOC's own guidelines on affirmative action.

81. *Equal Employment Opportunity Commission's Handling of Pay Equity Cases: Hearings Before the House Subcomm. on Manpower and Housing of the Comm. on Government Operations*, 98th Cong., 2d Sess., (1984) (Testimony of Clarence Thomas) *See also Report of House Committee on Government Operations on EEOC Handling of Sex-Based Wage Discrimination*, (1984). Eleanor Holmes Norton, former Chair of the EEOC, indicates that both before and after the 1978 reorganization, the EEOC had consistently filed such briefs in public sector cases. *See* Norton, *Equal Employment Law: A Crisis in Interpretation--Survival Against The Odds*, 62 Tulane L.Rev. 681, 705, n.98 (1988).

82. 29 U.S.C. § § 621-634.

83. 29 U.S.C. § 206(d).

84. *Justice Denied.*

85. Fred Alvarez, a former EEOC Commissioner, wrote that "This enforcement program grew out of the Commissioners' shared view that the agency's attention was not focused sufficiently upon the detection and prosecution of unlawful discriminatory conduct from among the approximately 70,000 charges of discrimination filed with the EEOC each year. The Commission. . . recognized that the agency's almost exclusive reliance on "rapid charge processing" was leading to an overemphasis on resolving charges through settlement and to an insufficient emphasis on finding and eliminating discrimination." Alvarez and Lipsky, *Remedies for Individual Cases of Unlawful Employment Discrimination: A Law Enforcement Perspective*, 3 A.B.A. Sec. Labor Lawyer, 199, 201 (1987).

86. "Guidance on Modification of the Administrative Charge Process" was adopted by the Commission on December 6, 1983.

87. *EEOC Statement of Enforcement Policy* (adopted September 11, 1984), *reprinted in* Daily Lab. Rep. (BNA) at D-1 (September 12, 1984). The policy provided that the goal of the EEOC was to pursue through litigation "each case in which merit has been found and conciliation has failed."

88. *EEOC Individual Remedies and Relief Policy*, *reprinted in* Daily Lab. Rep. (BNA) at E-1 (February 1985).
The policy provides that all remedies and relief sought in court, agreed upon in conciliation, or ordered in cases involving federal employees would contain the following elements, depending on the circumstances:
(1) A requirement that all employees of a particular company be notified of their right to be free of unlawful discrimination and be assured of non-recurrence of the kinds of discrimination found in the particular case;
(2) A requirement that corrective action be taken to ensure that violations would not recur;
(3) A requirement that identified victims of discrimination be unconditionally offered placement in the position that they would have occupied but for the discrimination suffered by that person;
(4) A requirement that identified victims be made whole for any losses suffered as a result of the discrimination; and
(5) A requirement that the employer cease from engaging in the specific practice found unlawful.

89. *Policy Statement on No Cause Findings*, *reprinted in* Daily Labor Rep. (BNA) at A-5 (Dec. 16, 1986). Regulations establishing the appeals procedure may be found at 20 C.F.R. s 1601.19 (1988). The Determinations Review Program was established to review such appeals and determine their merit.

90. *EEOC Enforcement Statistics*, (Women Employed Institute) (1988), from EEOC District Office Reports; EEOC Legal Services; EEOC Office of Program Operations Annual Reports Fiscal Years 1985, 1986; Women Employed Freedom of Information Requests.

91. U.S. General Accounting Office, *Equal Employment Opportunity: EEOC and State Agencies Did Not Fully Investigate Discrimination Charges* (1988). The six district offices studied were Atlanta, Dallas, Detroit, Memphis, New York, and Philadelphia. The five state agencies were the Georgia Office of Fair Employment Practices, the Michigan Department of Civil Rights, the Tennessee Human Rights Commission, the New York State Division of Human Rights, and the California Department of Fair Employment and Housing for Northern California.
As part of his reorganization of the Commission in 1982, Clarence Thomas established performance standards which required employees to close a specified number of cases in a given period of time. *Oversight Hearings on Federal Enforcement of Equal Opportunity Laws: Hearings before the House Subcomm. on Employment Opportunities*, 98th Cong., 1st Sess. (1983) (statement of Edward A. Watkins, President, National Council of EEOC Locals, American Federation of Government Employees (AFL-CIO).

92. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579, n.11 (1984)): "[L]ower courts have uniformly held that relief for actual victims does not extend to bumping employees previously occupying jobs."

93. Women Employed Institute, *EEOC Enforcement Statistics* (1988).

94. In fiscal year 1981, 166 systemic cases were filed; 69 in fiscal year 1982; 75 in fiscal year 1983, 112 in fiscal year 1984, 155 in fiscal year 1985, 148 in fiscal year 1986, and 105 in fiscal year 1987. *EEOC Enforcement Statistics*, Women Employed Institute.

95. Congress approved Reorganization Plan No. 1, which transferred from the then-existing Civil Service Commission (CSC) to the Equal Employment Opportunity Commission responsibility for federal sector EEO complaints.

96. The EEOC's regulations concerning federal sector employment discrimination may be found at 29. C.F.R. s. 1613 (1988).

97. *See e.g.*, General Accounting Office Report to the Chairman, Senate Committee on Labor and Public Welfare (May, 1975); Staff Report, Equal Employment Opportunity Commission, "Pilot Program for the Investigation of Title VII Complaints of Discrimination Arising in the Federal Sector," (October, 1980); General Accounting Office Report to the Chairman, Subcommittee on Manpower and Housing, Committee on Government Operations, House of Rep., "Problems Persists in the EEO Complaint Processing System for Federal Employees", (April, 1983); "Overhauling the Federal EEO Complaint Processing System: A New Look at a Persistent Problem", Comm. on Government Operations, H.R. Doc. No. 456, 100th Cong., 1st Sess. (1987).

98. *Report on Pre-Complaint Processing and Complaint Processing by Federal Agencies for Fiscal Year 1987* U.S. Equal Employment Opportunity Comm. (1988). At the request of Congress, the Washington Council of Lawyers surveyed the federal administrative process to learn about its day to day operation and the factors inhibiting its effectiveness.
The Council's findings indicated that (1) delay in processing is a significant problem in the federal EEO process; (2) notwithstanding the attempts of EEO personnel to exert independence, there is a conflict of interest in having agency officials influence all levels of the EEO process; and (3) there is a need for more extensive and consistent training of agency EEO personnel. Washington Council of Lawyers, *Report of the Washington Council of Lawyers on the Federal EEO Administrative Process* (1987).

99. *See* Speech by Clarence Thomas to the National Conference on Equal Employment Opportunity in the Federal Sector, October 1, 1982. Mr. Thomas, in speaking about affirmative action, noted that ". . . affirmative action was not created in a vacuum and . . . that affirmative action has been put in place because of [sic] minorities and women have been discriminated in the past." (emphasis in the original.) He noted further that " . . . it is settled that, as a matter of law, affirmative action--including the use of numerical goals, may be used in appropriate circumstances."; *see also* discussion of EEOC's actions regarding the *Williams* case, *supra*.

100. *See* "Policy Changes, Aggressive Enforcement, Will Mark next Term at EEOC, Thomas Says," 221 Daily Lab. Rep. (BNA) at A-6 (nov. 15, 1984).

101. *EEOC Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as amended*, 29 C.F.R. s 1608 (1988). The guidelines are designed to protect employers who voluntarily take affirmative action measures from changes of "reverse discrimination." The guidelines have never been revised.

102. *See Equal Employment Opportunity Commission Policies regarding goals and Timetables in Litigation Remedies: Hearings Before the Subcomm. on Employment Opportunities of the House Committee on Education and Labor*, 99th Cong. 2d Sess. Clarence Thomas promised to withdraw the policy during his reconfirmation hearings in the Senate. *See Nomination of Clarence Thomas Missouri to be Chairman of the Equal Employment Opportunity Commission: Hearings Before the Senate Comm. on Labor and Human Resources*, 99th Cong., 2d Sess. (1986) (Statement of Clarence Thomas, Chairman, EEOC)

103. At a hearing before the House Subcommittee on Government activities and Transportation on the refusal of NEH and Justice to submit goals and timetables, Clarence Thomas indicated in response to questioning from Congressmen Gerald D. Kleczka that it was unclear whether the EEOC was an independent agency, after the reorganization plan of 1978. *See Hearings Before the Subcomm. on Government Activities and Transportation of the House Comm. on Government Operations National Endowment for the Humanities and the Equal Employment Opportunity Commission Hiring Policies* 98th Cong. 2d Sess., (1984). In response to further questioning from Congresswomen Cardiss Collins, who chaired the hearing, Thomas indicated that "[t]here is nothing that I do to NEH or to anyone who does not obey," *Id.* at 31.

104. *See* Submission of Clarence Thomas to the Office of Management and Budget pursuant to Executive Order 12498 and OMB Bulletin No. 85-9 (February , 1985).

105. 839 F.2d 302 (7th Cir. 1988). The EEOC was ultimately unsuccessful in the *Sears* case, where the court found that the EEOC's statistical case of sex discrimination by Sears in both hire and promotion for commission jobs was rebutted by evidence that women in general were less interested in such jobs than men, even if women were matched with men for experience and announced interest. The court suggested that gender-related differences in appearance, communications skills, friendliness, assumption of responsibility and economic motivation could have been detected in interviews and thus concluded that the EEOC failed to account adequately for potentially important differences between men and women.

106. Thomas said that the Uniform Guidelines on Employee Selection Procedures encouraged "too much reliance on statistical disparities as evidence of employment discrimination." "Changes Weighed in Federal Rules on Discrimination." New York Times, Dec. 3, 1984 at A-1.

107. *See* Letter from Clarence Thomas to Congressman Augustus Hawkins, Chairman, House Committee on Education and Labor (July 15, 1986).

108. 29 U.S.C. § 206(d).

109. 452 U.S.161 (1981).

110. The statutory question resolved by the Court in *Gunther* was whether the Bennett Amendment, found in the last sentence of Section 703(h) of Title VII, restricts the statute's prohibition to claims of equal pay for equal work. The statute makes it unlawful for an employer "to discriminate against any individual" with respect to "compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Further, Title VII prohibits discrimination in hiring, classification, assignment, promotion, and discharge. The Bennett amendment, added two days before passage of Title VII, provides:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate on the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act].

The Supreme Court examined the language of the Equal Pay Act, which provides:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages . . . at a rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system;(ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

The Court concluded that the term "authorized" in the Bennett Amendment refers only to the Acts four affirmative defenses, and not to the equal work standard. Thus, claims for gender-based wage discrimination can be brought under Title VII even where no member of the opposite sex holds an equal but higher paying job.

111. *Women, Work and Wages: Equal Pay for Jobs of Equal Value* (H. Hartmann & D. Treiman, eds. 1981).

112. Equal Employment Opportunity Commission, *Hearings on Job Segregation and Wage Discrimination* (1980)

113. The EEOC was also *amicus* in *IUE v. Westinghouse*, 631 F.2d 1094, (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1981). In the *IUE* case, the Third Circuit found that, even though job classifications were not substantially equal, women in predominantly female job classifications could still compare their wages to wages paid to males in predominantly male job classifications. The employer in this case had relied on a job evaluation system to determine the relative worth of jobs at its facilities. Even though male and female job classifications received the same point-rating, however, wage rates for predominantly female job classifications were deliberately set lower than wage rates for predominantly male job classifications.

114. *See* "Notice Adopted by the Equal Employment Opportunity Commission to Provide Interim Guidance to Field Offices on Identifying and Processing Sex Based Wage Discrimination Charges Under Title VII and the Equal Pay Act" (Adopted for 90 Days on September 15, 1981). That notice was renewed regularly until 1985.

115. *See Oversight Hearings on the Federal Enforcement of Equal Employment Laws: Hearings Before the House Subcommittee on Employment Opportunities*, 98th Cong. 1st Sess. (1984). Testimony of Nancy Reder and Claudia Withers on behalf of the National Committee on Pay Equity. Nancy Reder, then Chair of NCPE also testified that on at least one occasion, NCPE had been informed that a potential charging party had attempted to file a wage discrimination charge in Chicago district office of the EEOC, only to be told that the office had no policy for handling that kind of case. NCPE provided a copy of the 90-day notice to the individual so that she could show it to the investigator in Chicago.

116. 578 F.Supp. 846 (D. Wash. 1983), rev. 770 F. 2d 1401 (9th Cir. 1985).

117. *See* "Administration May Fight Ruling on Equal Pay for Women's Jobs," *New York Times*, January 22, 1984.

118. The trial court was reversed by the Court of Appeals in *AFSCME v. Washington*, 770 F.2d 1401 (9th Cir. 1985), the Court held that the disparate impact theory could not be applied to the state's use of market surveys in setting wages. The Court ruled further the a discriminatory motive cannot be inferred from the state's reliance on the market combined with the job evaluation showing that such reliance reduces the wages of female-dominated jobs because there is no evidence that the free market discriminates and no indication that Congress intended to regulate it in this fashion. Job evaluation studies and statistics alone are insufficient to establish intent. Similarly, the plaintiffs' evidence of the state's sex segregation of jobs and its effect on wages was also insufficient to establish intent.

119. EEOC No. 85-8, 37 FEP Cases 1889 (BNA) (June 17, 1985). The charge on which the decision was based involved allegations by female employees of the Rockford, Illinois Housing Authority that the employer paid its administrative staff (85 percent female) less than its maintenance staff (88 percent male), even though the duties performed by the women required equal or more skill, effort and responsibility than those performed by men. The female employees charged further that the employer intentionally set wage increases for female dominated jobs at lower levels than the prevailing rate of increase for such jobs in local municipal agencies, while giving men wage increases that equalled the prevailing rate for their jobs.

The EEOC's decision was greeted with disappointment by advocates because it was deemed to be an incorrect application of Title VII and because the investigation leading to the decision was faulty. *See Justice Denied* at 21-22; unpublished statement of Claudia Wayne, Executive Director of the National Committee on Pay Equity.

120. *EEOC Enforcement Statistics*, Women Employed Institute (1988). In fiscal year 1982, the EEOC filed 35 Equal Pay Act cases; in fiscal year 1983, 21; in fiscal year 1984, 9; in fiscal year 1985, 10; and in fiscal year 1986, 12.

121. *See, e.g.*, *Bundy v. Jackson*, 641 F. 2d 934 (D.C. Cir. 1981) (Title VII precludes sexual harassment based on a hostile working environment where sexual intimidation was "standard operating procedure" of the agency); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (Title VII is violated

where a supervisor abolished employee's job after she resisted his sexual advances). In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57(1986), the Supreme Court dealt with sexual harassment for the first time. It confirmed that Title VII is not limited to "economic" or "tangible" discrimination; a "hostile environment" claim, therefore, is actionable under Title VII.

122. *EEOC Guidelines on Sexual Harassment*, 29 C.F.R. 1604 (1985). Section 1604.11(a) of the guidelines define sexual harassment:
Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.
The guidelines were developed in response to the activity in the courts on the issue and to the response to Congressional hearings on sexual harassment in the federal government. *See Hearings on Sexual Harassment in the Federal Government Before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Service*, 96th Cong.,2d Sess. (1979); *Examination of Issues Affecting Women in Our Nation's Labor Force: Hearings Before the Senate Comm. on Labor and Human Resources* 97th Cong., 1st Sess. (1981) (Statement of J.Clay Smith, Jr. Acting Chairman, Equal Employment Opportunity Commission).

123. Then Vice President Bush's Task Force on Regulatory Relief described the EEOC Sexual Harassment guidelines as being "vague and failing to provide guidance on what constitutes prohibited behavior."

124. 106 S. Ct. 2399 (1986).

125. *See* Brief for United States and Equal Employment Opportunity Commission as *Amici Curiae Meritor Savings Bank, FSB v. Vinson*, 103 S.Ct. 2399, (1985). Such an analysis would look to whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and if available and utilized, whether that procedure was reasonable responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment. In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials.

126. *Vinson*, at 2408. It stated, however, that absence of notice to an employer of alleged harassment would not necessarily insulate it from liability; nor would the "mere existence of a grievance procedure and a policy against discrimination."

127. EEOC Policy Guidance on Current Issues of Sexual Harassment (1988) [hereinafter Policy Guidance].

128. Policy Guidance, *supra*, at 23-24.

129. *Id.* at 24. Other standards set out in the policy statement also appear more worker-oriented than previous actions taken by the Commission would suggest. The policy statement overrules a 1983 decision by the EEOC which provided that a charging party could never prevail if she has no other witnesses to the alleged harassment. According to the policy statement, "If the investigation exhausts all possibilities for obtaining corroborative evidence, but finds none, the Commission may make a cause finding based solely on a reasoned decision to credit the charging party's testimony." The 1988 statement also takes issue with the Sixth Circuit's decision in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1983 (1987), which held that a plaintiff who entered a work environment that was pervaded with obscenity should reasonably have expected sexual harassment and therefore could not successfully press a hostile environment claim. According to the EEOC's policy statement, "The Commission believes these factors rarely will be relevant and agrees . . . that a women does not assume the risk of harassment by voluntarily entering an abusive, anti-female environment."

130. 679 F. Supp. 495 (W.D. Pa.), *aff'd mem.*, No. 88-3099 (3d Cir. 1988).

131. Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae*, *Miller v. Aluminum Co. of America*, (No. 88-3099).

132. 29 C.F.C. § 1604.11(g). According to the EEOC's Sexual Harassment guidelines:
Where employment opportunities or benefits are granted because of an individual's submission to the employer's advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity benefit.

133. Request No. 05830088 (EEOC Oct. 3, 1984), *aff'd* App. No. 01820227 (EEOC Oct. 8, 1982). In that case, the EEOC stated that the guidelines applied to a complainant's claim that female postal workers engaged in sexual activities with supervisors were given more favorable assignments "despite the fact that Appellant acknowledges that she was not the direct object of her employer's requests for sexual favors."

134. 429 U.S. 125 (1976).

135. The Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k)(1982) [hereinafter PDA]. The PDA provides that: "The terms "because of sex" and "on the basis of sex" include but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."

136. *EEOC Guidelines on Pregnancy*, 29 C.F.R. § 1604.10 (1988).

137. 462 U.S. 669 (1983).

138. 479 U.S. 272, 107 S.Ct. 683, (1987).

139. *See* Brief of the United States as *Amicus Curiae*, *California Federal Savings and Loan v. Guerra* (No. 85-494).

140. 825 F. 2d 458 (D.C. Cir. 1987), *cert. granted*, 108 S.Ct. 1106 (1988).

141. The EEOC can target the industries should be looked at more closely by reviewing EEO-1 data to determine where women and people of color are under-represented; the "portraits" of industries that are developed can be the basis for systemic litigation. Such targeting should be developed in the District office, and be geared to the region in which the office is located. There should be coordination between headquarters and District office, so that pertinent information about pending cases can be exchanged.

142. Exec. Order No.8802, 3 C.F.R.(1938-43) (1941). President Franklin Roosevelt signed the order to forestall a march by blacks on Washington that was planned by A. Phillip Randolph.

143. Exec. Order No.9346, 3 C.F.R.(1938-43) (1943).

144. *Final Report of the President's Committee on Fair Employment Practices* (1947).

145. *Id.* at VI.

146. *Id.* at VIII.

147. Exec. Order No. 10479 (August 13, 1953).

148. Exec. Order No. 10557 (September 3, 1954).

149. Committee on Government Contracts, *Pattern for Progress, Final Report to President Eisenhower* (1959/60).

150. The Attorney General at the time concluded that the provisions of the Executive Order requiring affirmative action and providing for sanctions were lawful. 42 Op. Att'y Gen. 97 (1961).

151. 33 Fed. Reg. 7,804 (1968).

152. 35 Fed. Reg. 2,586 (1970).

153. 36 Fed. Reg. 23,152 (1971).

154. J. Leonard, *The Impact of Affirmative Action*, (1983). Leonard found that the "affirmative action goal is the single best predictor of subsequent employment demographics." *Id.* at 25.

155. Office of Federal Contract Compliance Programs, *Employment Patterns of Minorities and Women in Federal Contractor and Non-Contractor Establishment, 1974-1980* (1984).

156. 36 Fed. Reg. 42968 (1981); 47 Fed. Reg. 1770 (1982).

157. Such reviews had been used in the past to secure specific commitments for improvements from employers with poor employment records.

158. *See* Letter from Douglas J. Bielan, Acting Director, Office of Interagency Coordination, Equal Employment Opportunity Commission, July 2, to Ellen Shong, Director, Office of Federal Contract Compliance Programs from Douglas J. Bielan, Acting Director, Office of Interagency Coordination, Equal Employment Opportunity Commission, July 2, 1981.

159. *Report of the Citizen's Commission*, at 93; Office of the Inspector General, U.S. Department of Labor, Office of Audit, *Office Needs to More Effectively and Consistently Enforce Federal EEO Regulations* (September 1988) [hereinafter *OFCCP Audit Report*].

160. OFCCP Order No. 760a1 (March 10, 1983).

161. *Id.*

162. *See* Women Employed, *Analysis of National Self-Monitoring Reporting System*, (March 1984) *reprinted in* Daily Lab. Rep.(BNA), April 1984.

163. *See* Memorandum from Associate Solicitor James D. Henry to Susan Meisinger, *reprinted in* Daily Lab. Rep. No. 70 (BNA) (Apr. 1984). Mr. Henry's memorandum expressed his concern regarding the NSMRS program's vulnerability to legal challenge.

164. OFCCP Audit Report.

165. Proposed Executive Order (1985).

166. Congressmen Augustus Hawkins and James Jeffords co-authored a letter to President Reagan urging the retention of Executive Order 11246, as amended. The letter was signed by 200 members of the House of Representatives and 70 members of the Senate. *See Oversight Review of the Department of Labor's Office of Federal Contract Compliance Programs and Affirmative Action Programs: Hearings Before the House Subcomm. on Employment Opportunities of the House Committee on Education and Labor*, 99th Cong., 1st Sess. (1985).

167. *OFCCP Enforcement Statistics*, Women Employed Institute (1988), taken from OFCCP Quarterly Review and Analysis Reports.

168. *OFCCP Enforcement Statistics*.

169. *Id.*

170. OFCCP Audit Report.

171. *See* 41 C.F.R. § 60-1.26.

172. The organization which had filed the original complaint was granted limited intervenor status. Women Employed was represented by the National Women's Law Center of Washington, D.C.

173. *See OFCCP v. Harris Trust and Savings Bank*; 78-OFCCP-2, January 10, 1989.

174. "Chicago Bank Settles Bias Case for Record $14 Million," *Los Angeles Times*, January 11, 1989.

175. In early 1970's the OFCCP targeted the coal mining industry as one of several industries on which to focus enforcement efforts. The gains achieved by women because of this focus were dramatic: By December 1980, 3,295 women had become coal miners. There had been none just seven years earlier. Thus, the percentage of women hired in the coal mining industry went from 0 to 8.7 percent in seven years. *Examination on Issues Affecting Women in Our Nation's Labor Force: Hearings Before the Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. (1981) (Statement of Betty Jean Hall, Director, Coal Employment Project).

176. On the recommendation of a number of organizations, these "strike forces" were implemented for a time at the end of the Carter administration; they were, however, dropped as a targeting tool.

Chapter XV

1. Dr. Orentlicher is the Ethics and Health Policy Counsel at the American Medical Association, Chicago, Illinois.
2. Ms. Halkola is a legal assistant at Sidley & Austin, Washington, D.C.
3. Children's Defense Fund, *A Children's Defense Budget* FY 1989 xxiv (1988). (Hereinafter CDF)
4. Hughes, Johnson, Rosenbaum & Simons, "The Health of America's Mothers and Children: Trends in Access to Care," 20 *Clearinghouse Rev*. 472, 475 (1986), citing the National Center for Health Statistics.
5. *See infra*, at 12.
6. Hughes, *supra* note 4, at 472, 475.
7. K. Wing, "The Impact of Reagan-Era Politics on the Federal Medicaid Program," 33 *Cath. U.L. Law Rev.* 1, 6 (1983).
8. *The World Almanac and Book of Facts 1989*, (New York, Pharos Books). The coverage of pregnant women under the Medicaid program did not suffer as much as many other services. However, since the federal budget cuts ultimately reduced eligibility for Medicaid, an increased number of women were unable to obtain prenatal care because they did not or no longer would have qualified for Medicaid coverage. K. Wing, *supra* note 7, at 51.
9. CDF, *supra* note 3, at 248.
10. *Id.* at 257.
11. *Id.* at 256.
12. Rosenbaum, "The Prevention of Infant Mortality: The Unfulfilled Promise of Federal Health Programs for the Poor," 17 *Clearinghouse Rev.* 701, 710 (1983).
13. *See*, *infra*, at 219.
14. Taylor & Pernoll, "Normal Pregnancy & Prenatal Care," in *Current Obstetrics and Gynecological Diagnosis and Treatment* 161 (M. Pernoll & R. Benson, 6th ed. 1987).
15. Taylor & Pernoll, supra note 14, at 168-174, 176; Leveno, "Prenatal Care and the Low Birth Weight Infant," 66 *Obstetrics and Gynecology* 599, 603 (1985).
16. U. S. General Accounting Office, Prenatal Care: Medicaid Recipients and Uninsured Women Obtain Insufficient Care, GAO/HRD-87-137, 13 (1987).
17. *Id.* at 14.
18. The infant mortality rate for any year is defined as the number of babies per 1000 live births who die in their first year of life. U.S. Congress, Office of Technology Assessment, *Healthy Children: Investing in the Future, OTA-H-345, 4 (1988).*
19. GAO, *supra* note 16, at 13.
20. *Id.* Very low birthweight is defined as birthweight less than 1,500 grams.
21. GAO, *supra* note 16, at 15. "The Differential Effect of Prenatal Care in the Incidence of Low Birth Weight among Blacks and Whites in a Prepaid Health Plan," 319 *New Eng. J. of Med.* 1385 (1988). Also, infants who weigh under 1,500 grams at birth are "10 times more likely to have neurodevelopmental handicaps and continue to be at higher risk of series or protracted illness." Mundinger, "Health Service Funding Cuts and the Declining Health of the Poor," 313 *New Eng. J. of Med.* 44, 46 (1985).
22. GAO, *supra* note 16, at 12; OTA, *supra* note 18, at 6.
23. Taylor and Pernoll, *supra* note 14, at 162-63.
24. Benson, "Preterm Labor and the Low-Birth-Weight Infant," in *Obstetrics and Gynecology* 682 (D. Danforth ed., 4th ed. 1982).
25. *Id.*; "Outcome of Infants of Very Low Birthweight: A Geographically Based Study," 136 *Can. Med. Assoc. J.* 1157 (1987); Taylor, "Low Birthweight and Neurodevelopmental Handicap," 11 *Clinics in Obstetrics and Gynecology 525, 525 (1984); Nelson & Ellenberg, "Predictors of Low and Very Low Birth Weight and the Relation of These to Cerebral Palsy," 254 J.A.M.A.* 1473, 1473 (1985).

26. OTA, *supra* note 18, at 4-5.

27. The American College of Obstetricians and Gynecologists recommends the following schedule of visits for proper prenatal care: care should begin as early as possible in the first trimester, with visits every four weeks for the first twenty-eight weeks of pregnancy, every two to three weeks for the next eight weeks, and weekly thereafter. In general, care is defined by a combination of the number of total visits and the timing of the first visit. "Adequate" care would begin in the first trimester and include nine or more visits, "intermediate" care would begin in the second trimester or include five to eight visits, and "inadequate" care would begin in the third trimester or include less than five visits. Care is also occasionally defined as "early" (beginning in the first trimester), "intermediate" (beginning in the second trimester) and "late" (beginning in the last trimester). "Prenatal Care: Reaching Mothers, Reaching Infants," *Institute of Medicine*, 27 (1988).

28. *See*, *Health Care for the Economically Disadvantaged-II, 1984: Hearing Before the Subcomm. on Health of the Senate Comm. on Finance*, 98th Cong., 2d Sess. 269, 282-84 (1984). (Statement of Sara Rosenbaum, Director, Child Health Division, Children's Defense Fund.) *See* also Hughes, *supra* note 4; GAO, *supra* note 16, at 13, citing figures from the Department of Health and Human Services.

29. Health Care Hearing, *supra* note 28 at 282-283. Statement of Sara Rosenbaum, Director, Child Health Division, Children's Defense Fund. Other areas with similar programs had the following results: Chicago - 60 percent less perinatal deaths, 25 percent less pre-term infants; New York City - 20 percent lower low birthweight; Rhode Island (Providence) - a 25 percent decline in low birthweight.

30. *Id.*

31. GAO, *supra* note 16, at 14.

32. Hughes, *supra* note 4.

33. This figure does not necessarily represent the total cost of prenatal care and delivery as it is in the private medical sector. Rather, because it is the amount that Medicaid reimbursed physicians for prenatal care in 1985, it is the amount that would have to be expended per pregnant woman for prenatal care if Medicaid eligibility were expanded.

34. Nineteen percent of the low birthweight babies who survived the first year had to be rehospitalized at least once during that year. The figure for normal birthweight babies is 8.4 percent. In 1986, the extra cost of rehospitalization in the first year was roughly $800 per low birthweight birth. OTA, *supra* note 18, at 84.

35. OTA, *supra* note 18, at 9; also, the American Academy of Pediatricians estimates that for every dollar spent on prenatal care, between $2 and $10 is saved in low birthweight costs. GAO, *supra* note 16, at 14. The Institute of Medicine puts that figure at $3.38 saved for every dollar spent. Inst. Med., *supra* note 27 at 2. Also, in Colorado, one study found that the average lifetime cost for low birthweight is $20,000, while the average costs for each baby who survived but had special problems as a result of low birth weight is $123,000. Health Care Hearing, *supra* note 28 at 284. (Statement of Sara Rosenbaum, Director, Child Health Division, Children's Defense Fund).

36. *N.Y. Times* (national edition), Dec. 28, 1988, at 25.

37. OTA, *supra* note 18, at 10. It should be noted that as a general rule, the higher the infant mortality rate, or the higher the low birthweight rate, the easier it is to effect reductions in that rate. This is a general phenomenon in many areas of medicine; for instance, it is easier to increase life expectancy in a country where the life expectancy is low, as compared to in a country where life expectancy is already high.

38. Murray and Bernfield, "The Differential Effect of Prenatal Care in the Incidence of Low Birth Weight among Blacks and Whites in a Prepaid Health Care Plan," 319 *New Eng. J. of Med.* 1385, 1390 (1988). Studies done in individual states also consistently support the contention that prenatal care is more cost-effective than the neonatal care costs brought about by low birthweight. For instance, the California Department of Consumer Affairs estimated that $1.4 million dollars was saved by providing 1000 women with prenatal care in a perinatal care project over 5 years. In Michigan, $4.9 million in prenatal care could have averted $30 million in neonatal intensive care (*i.e.*, for every $1 invested in prenatal care, $6.12 was saved in NIC costs). In New Mexico, $64,000 in prenatal care could have saved $310,000 in post-natal costs. Health Care Hearing, *supra* note 28 at 283-283 (Statement of Sara Rosenbaum, Director, Child Health Division, Children's Defense Fund).

39. CDF, *supra* note 3.
40. Hughes, *supra* note 4, at 475.
41. Hoffman, ed. *The World Almanac and Book of Facts* 1987, 636 (New York, Ballantine Books) (1987).
42. OTA, *supra* note 18, at 4.
43. *Id.* at 32.
44. *See* appendix, infra.
45. Inst. Med., *supra* note 27, at 2.
46. *See* app., *infra*.
47. CDF, *supra* note 3.
48. *Washington Post*, Feb. 3, 1987 at Z12, col. 1.
49. Hoffman, ed., *The World Almanac and Book of Facts* 1987 (New York, Ballantine Books).
50. CDF, *supra* note 3, at 248; 31.1 percent of blacks live below the poverty line, while only 11.0 percent of whites are below poverty level.
51. OTA, *supra* note 18, at 32.
52. *Supra*, at 8.
53. Hughes, *supra* note 4, at 473.
54. *Id.*
55. Hughes, *supra* note 4, at 473. As of 1985, the nationwide percentage of women who had received prenatal care was 79.4 percent, up only one-tenth of one percent since 1980. Inst. Med., *supra* note 27, at 49.
56. From 1968 until 1980, the United States infant mortality rate declined nearly 50 percent for both blacks and whites. Since 1980, the rate at which infant mortality has declined in the United States has decreased by 20 percent, going from a decline rate of 4.1 percent per year previous to 1981, to 3.3 percent rate for the years 1981-1984. OTA, *supra* note 18, at 34, citing U.S. Department of Health and Human Services, Public Health Service, National Center for Health Statistics, unpublished data from the U.S. vital statistics, Hyattsville, MD., 1986, 1987.
57. OTA, *supra* note 18, at 6.
58. *See* app., *infra*.
59. OTA, *supra* note 18, at 34-35.
60. Hughes, *supra* note 4, at 473, citing National Center for Health Statistics figures.
61. *Id.* at 476. Neonatal mortality refers to deaths during the first four weeks of life.
62. Post neonatal mortality is still largely a matter of maternal health but is also affected by factors such as environment, living conditions, nutrition, etc.
63. *Id.*
64. As mentioned above, see supra, pp. xx-xx, when prenatal care is initiated early in pregnancy, health problems for the infant-to-be are more readily prevented.
65. Inst. Med., *supra* note 27, at 49, citing statistics from the National Center for Health Statistics.
66. In 1969, the number of women of all races receiving no or late prenatal care was 7.3 percent. A decade later, that figure had declined to 5.1 percent. However, the years 1980-1985 saw an increase in the number of women receiving no or late care from 5.1 to 5.7 percent.
67. Inst. Med., *supra* note 27, at 50, citing the National Center for Health Statistics.
68. *Id.* at 47.
69. Health Care Hearing, *supra* note 28, at 256. (Statement of Dr. A. Janelle Goetcheus, Medical Director of Community of Hope Health Services, Columbia Road Health Services, and So Others Might Eat Health Services).
70. *Washington Post*, Feb. 2, 1984, at A6, col 1.
71. *Washington Post*, Jan. 4, 1984, at A1, col. 8.
72. Inst. Med., *supra* note 27, at 51.
73. GAO, *supra* note 16.
74. *Id.* at 27-28.

75. The GAO study appears to have classified any woman who was covered by Medicaid at any time during her pregnancy as Medicaid insured. *See id.* at 45.

76. *Id.* at 19.

77. Mullett, Leonard, Oberg & Lia-Hoagberg, "A Comparison of Birth Outcomes by Payment Source," 72 *Minnesota Med.* 365 (1988).

78. The Minnesota study also determined that, next to women with private insurance, women with access to free prenatal care were most likely to receive adequate care than were uninsured or Medicaid-insured women. *Id.* at 368.

79. *Id.*

80. Inst. Med., *supra* note 27, at 30.

81. *Id.* at 30.

82. Health Care Financing Administration; unpublished statistics, Medicaid Recipients, Expenditures by Age, Sex, and Race: Fiscal Year 1986, Medicaid Abstract No. 88-24.

83. Inst. Med., *supra* note 27, at 32. The Institute of Medicine also reports that women of Cuban mothers are unusual in their use of prenatal services. Cuban women have even better utilization rates than non-Hispanic white women. The Institute concluded that "such subgroup diversity suggests that the problem of inadequate care among Hispanic women is not due to Hispanic origin per se, but rather to other factors--probably income, education, previous experiences with other health care systems, or a combination of all three." *Id.* at 33.

84. GAO, *supra* note 16; Inst. Med., *supra* note 27, at ; Mullett, Leonard, Oberg & Lia-Hoagberg, "A Comparison of Birth Outcomes by Payment Source," 72 *Minnesota Med.* 365 (1988).

Women most likely to receive insufficient care are those who are: un- or underinsured, have poor education, are adolescents, come from minority groups, or live in large urban areas. Women most likely to receive sufficient care are: white, well-educated, in their early thirties, live in a rural area, or are on Medicaid.

85. GAO found that the three most significant barriers to care for women are 1) lack of financial resources 2) lack of transportation (which is closely related to financial status) and 3) lack of awareness of the pregnancy. GAO, *supra* note 16, at 32. 86. GAO, *supra* note 16, at 38.

87. Rosenbaum, *supra* note 12, at 705.

88. J. Hadley, *More Medical Care, Better Health* 93 (1982)(available from Urban Institute), cited in Rosenbaum, *supra* note 12, at 705.

89. Rosenbaum, "The Prevention of Infant Mortality: The Unfulfilled Promise of Federal Health Programs for the Poor," 17 *Clearinghouse Rev.* 701, 705 (1983).

90. CDF, *supra* note 3, at 34.

91. CDF, *supra* note 3, at 260. In other words, if a woman earns 20 percent or more of the poverty level, she is not eligible for AFDC.

92. *Id.* at 34. *See* app., *infra*.

93. Thus, while a state must provide assistance to those who meet the state's definition of categorically needy, it may or may not aid those who are medically needy.

94. *Id.*

95. The percentage of people under the poverty level who were covered by Medicaid dropped from 65 percent in 1976 to 38 percent in 1984.

96. These budget cuts are described below. *See infra*.

97. 127 Cong. Rec. H511 (daily ed. Feb. 18, 1981).

98. K. Wing, *supra* note 7, at 40, 46.

99. *Id.* at 60.

100. More specifically, the cuts would have meant: a reduction in federal matching funds of optional services for the categorically needy and a 3 percent cut in funding for the medically needy; copayments for certain "optional" services; and reductions in AFDC that would reduce Medicaid eligibility. *Id.* at 61, n.222.

101. *Id.* at 68.

102. *Washington Post*, Feb. 23, 1984, at A6, col. 1.

103. Dallek, "Health Care for America's Poor: Separate and Unequal," 20 *Clearinghouse Rev.* 361, 362 (1986).
104. OTA, *supra* note 18, at 44.
105. Inst. Med., *supra* note 27, at
106. Hughes, *supra* note 4, at 477.
107. OTA, *supra* note 18, at 42.
108. Indeed, the number of Medicaid recipients has not changed since 1974. *N.Y. Times*, April 6, 1981, B12, col. 1.
109. Health Care Hearing, *supra* note 28, at 280 (Statement of Sara Rosenbaum, Director, Child Health Division, Children's Defense Fund).
110. *See supra*.
111. *See* app., *infra*. Poverty level for a family of 3 for 1988 is $9,960.
112. *See* app., *infra*. Also, the actual amount of eligibility can vary from state to state. For instance, in Alabama and Mississippi, the maximum income eligibility level is only 15.5 percent of poverty level, or approximately $1,500. In California, the state with the highest maximum income level, the threshold is 79.6 percent of the poverty level, or approximately $7,700 dollars of income for a family of three. *See* app., *infra*.
113. *New York Times*, May 5, 1981, at B12, col. 4.
114. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 312, 95 Stat. 357, 853 (1981).
115. *New York Times*, May 5, 1981, at B12, col. 4.
116. *See supra*, at 219.
117. Mullett, *supra* note 77, at 365.
118. *See supra*, n.35.
119. *See, id.*
120. Johnson, "Recent Improvements in Medicaid Coverage of Low Income Children and Pregnant Women," *Children's Defense Fund* 2 (1988).
121. For a general discussion of the Reagan Administration's exact methods for shifting financial and administrative responsibility to the states, please see K. Wing, *supra* note 7, at 28-42, 75-90.
122. Thus, the wealthier states received less funding.
123. K. Wing, *supra* note 7, at 40.
124. From 1975 to 1980, Medicaid costs increased 15 percent per year. *Id.* at 39.
125. *Id.* at 40-41.
126. *Id.* at 49.
127. *Id.* at 49. Three percent from the federal Medicaid share was to be deducted in 1982, 4 percent in 1983, and 5 percent in 1984.
128. *Id.* at 52.
129. *Id.*
130. *Id.* at n.187.
131. *Id.* at 51-53, nn.186-190.
132. The programs served groups ranging from miners suffering from black lung to support for foster care, adoption of homeless children, migrant health, birth control, community health centers in ill-served rural areas, and alcohol and drug treatment center. *Washington Post*, Mar. 8, 1981 at A1, col. 4.
133. *Id.*
134. The programs were: Maternal and Child Health and Crippled Children's Services; Supplemental Security Income for Disabled Children; Lead-based Paint Poisoning Prevention; Sudden Infant Death Syndrome; Hemophilia Treatment Centers; and Adolescent Pregnancy. Pub. L. No. 97-35, Sec. 2191, 95 Stat. 357, 818-830 (1981).
135. K. Wing, *supra* note 7, at 85.
136. *Id.*
137. As discussed above, *supra*, at 219-220, prenatal care is ultimately the most cost-effective approach to preventing infant mortality and disability.

138. *Washington Post*, Feb. 23, 1984, at A6, col. 1; "Perkins, The Effects of Cost Containment in the Poor: An Overview," 19 *Clearinghouse Rev.* 831, 839-841 (1985).
139. Perkins, "The Effects of Cost Containment in the Poor: An Overview," 19 *Clearinghouse Rev.* 831, 840-41 (1985). The studies are: Intergovernmental Health Policy Project, Medicaid Costs Sharing, FOCUS ON, Sug. 1984; Marquis, "Cost Sharing and The Patient's Choice of Provider" (Sept. 1984); Helms, "Copayments and Demand for Medical Care: The California Medical Experience" (Fed. 1979); Roemer, "Copayments for Ambulatory Care: Penny-Wise and Pound Foolish," 13 *Med. Care* 457 (1975).
140. *See* Perkins, *supra* note 138; Health Care Hearing, *supra* note 28 at 253.
141. Inst. Med., *supra* note 27, at 62.
142. *Americans at Risk: The Case of the Medically Uninsured: Hearing Before the Spec. Comm. on Aging of U.S. Senate*, 99th Cong., 1st Sess. 2 (1985); Dallek, "Health Care for the America's Poor: Separate and Unequal," 20 *Clearinghouse Rev.* 361, 363 (1986). The number of uninsured people grew 22 percent between 1979 and 1984. *Id.* at 362.
143. Iglehart, "Medical Care of the Poor--A Growing Problem," 313 *New Eng. J. of Med.* 59, 60 (1985).
144. "Health Service Funding Cuts and the Declining Health of the Poor," 313 *New Eng. J. of Med.* 44, 45 (1985).
145. Americans at Risk: The Case of the Medically Uninsured: Hearing Before the Spec. Comm. on Aging of U.S. Senate, 99th Cong., 1st Sess. 12 (1985) (Statement of Elizabeth Morrison, Vice President, Herget & Co., Inc); Inst. Med., *supra* note 27, at 57.
146. GAO, *supra* note 16, at 15.
147. Inst. Med., *supra* note 27, at 5.
148. F.A. Sloan, J. Valvona and R. Mullner, Identifying the Issues: a Statistical Profile, presented at the conference on Uncompensated Hospital Care: Defining Rights and Assigning Responsibilities, Vanderbilt University, April, 1984.
149. Health Care Hearing, *supra* note 28, at 14.
150. *Id.* at 120.
151. K. Wing, *supra* note 7, at 89 n.294.
152. Hughes, *supra* note 4, at 473; Also *see generally*, Americans at Risk: The Case of the Medically Uninsured: Hearing Before the Spec. Comm. on Aging of U.S. Senate, 99th Cong., 1st Sess. (1985); Health Care Hearing, *supra* note 28; and H.R. Rep. No.100-531, 11th Cong., 2d Sess. (1988).
153. H.R. Rep. No. 531, 100th Cong., 2d Sess. 8 (1988)
154. *Id.*
155. *Id.*
156. Rosenbaum, *supra* note 12, at 723; Dallek, "Health Care for America's Poor: Separate and Unequal," 20 *Clearinghouse Rev.* 361, 366 (1986).
157. The impact falls especially hard in rural areas. Indeed, over 40 percent of the counties in Georgia and Alabama no longer have a physician delivering obstetrical services. Georgia Obstetrical and Gynecological Society, Physician Survey (1987); Medical Association of the State of Alabama, Survey on Obstetrical Care (March 1988).
158. Inst. Med., *supra* note 27, at 66-68.
159. Rosenbaum, *supra* note 12, at 714; GAO, *supra* note 16, at 50; Inst. Med., *supra* note 27, at 71-73.
160. *See* GAO, *supra* note 16, at 50; Inst. Med., *supra* note 27, at 74-75.
161. Inst. Med., *supra* note 27, at 95-95, 99; GAO, *supra* note 16, at 34.
162. See Inst. Med., *supra* note 27, at 73-75; GAO, *supra* note 16, at 34-35, 45. For a general cataloguing of non-economic barriers to care, see Inst. Med. 88-113. The Institute of Medicine has reviewed the findings of several prominent studies on barriers to prenatal care as well as women's perceptions of them.
163. Inst. Med., *supra* note 27, at 92-107.
164. *Id.* at 101-102.

165. *Id.* at 75; *See* also Juares Associates, "How to Reach Black and Mexican-American Women." Report submitted to the Public Health Service, Dept. of Health and Human Services, Contract No. 282-81-0082; Wan, Th., "The Differential Use of Health Services: A Minority Perspective." *Urban Health* 2:47-49, 1977.

166. Inst. Med., *supra* note 27, at 100; citing Joyce, K., Diffenbacher, G., Greene, J., and Sorokin, Y., *Internal and External Barriers to Obtaining Prenatal Care*, Soc. Work Health Care 9:89-96, 1983.

167. *Id.* 65.

168. *New York Times*, May 5, 1984, at A1, col.1; *Washington Post*, March 17, 1984, at A12, col. 2.

169. *New York Times*, May 5, 1984, at A1, col.1

170. *New York Times*, May 5, 1984, at A1, col.1

171. All information regarding Medicaid eligibility expansions were taken from: Johnson, "Recent Improvements in Medicaid Coverage of Low Income Children and Pregnant Women," *Children's Defense Fund* (1988).

172. Inst. Med, *supra* note 27, at 62.

173. *Id.* at 73.

174. Johnson, "Recent Improvements in Medicaid Coverage of Low Income Children and Pregnant Women," *Children's Defense Fund* 3 (1988).

175. Inst. Med., *supra* note 27, at 61-62.

176. "Children's Rights--Developments in 1986," *Clearinghouse Rev.*, Jan. 1987, 1127.

177. CDF, *supra* note 3, at xi (quoting G. Campbell Morgan, "The Children's Playground in the City of God," *The Westminster Pulpit*, at 262 (circa 1908)).

178. Inst. Med., *supra* note 27, at 142; OTA, *supra* note 18, at 20.

179. OTA, *supra* note 18, at 20.

180. Inst. Med., *supra* note 27, at 142.

181. GAO, *supra* note 16, at 48.

182. *Id.* at 65.

183. *Id.*

184. CDF, *supra* note 3, at 17.

185. Inst. Med., *supra* note 27, at 5; GAO, *supra* note 16, at 3-4.

186. Personal communication with John Stobierski, Public Information Director, Massachusetts Dept. of Public Health, December 1988.

187. *Washington Post*, September 22, 1988, at A32, col. 1.

188. *Id.*

189. Inst. Med., *supra* note 27, at 165-166. Presently, parts of the Healthy Start Program are being phased into the Common Health Program, part of the recent universal health care legislation that was passed last summer in Massachusetts. Henceforth, the Common Health program will provide comprehensive prenatal services to all pregnant women whose incomes do not exceed 185 percent of the poverty level. Healthy Start will continue to provide coverage for prenatal care for uninsured women whose incomes exceed 185 percent but are less than 200 percent of poverty level. Coverage will be, in effect, the same as it was for women under the original Healthy Start Program. John Stobierski, Director of Public Information, Massachusetts Department of Public Health, personal communication, January 1989.

190. Inst. Med., *supra* note 27, at 124.

191. Department of Public Health, Health and Welfare Agency of the State of California, Final Evaluation of the Obstetrical Access Pilot Project July 1979-1982, viii (1984).

192. *Id.* at 2.

193. In 1984, the California legislature, impressed by the positive results of the pilot program, passed a bill establishing the Comprehensive Perinatal Services Program. The program requires that OB Access services be made available to all Medi-Cal women who are pregnant. Also, another program, the "Community-Based Perinatal Services Program," is currently in place which provides comprehensive perinatal care to women whose incomes fall below 200 percent of federal poverty level. Inst. Med., *supra* note 27, at 171.

194. Department of Public Health, Health and Welfare Agency of the State of California, Final Evaluation of the Obstetrical Access Pilot Project July 1979-1982 3 (1984).

195. *Id.* at 2.

196. *Id.* at 61.

197. Inst. Med., *supra* note 27, at 171.

198. In other words, for every dollar spent, $1.70 to $2.61 was realized in benefits.

199. Department of Public Health, Health and Welfare Agency of the State of California, Final Evaluation of the Obstetrical Access Pilot Project July 1979-1982 viii (1984).

200. For a more complete listing of other state programs, see Inst. Med., *supra* note 27, at 163-209.

201. *Id.* at 100.

202. *Id.* at 129-134.

203. Inst. Med., *supra* note 27.

204. "Children in Need: Investment Strategies for the Economically Disadvantaged," as quoted in CDF, *supra* note 3, at xiii.

205. Inst. Med., *supra* note 27, at 136.

Chapter XVI

1. *See, e.g.*, J. Abrams, "Forbidden Neighbors--A Study of Prejudice In Housing" (1955); *U.S. Commission on Civil Rights, Housing* (1961); Comment, "Mortgage Discrimination: Eliminating Racial Discrimination in Home Financing Through The Fair Housing Act of 1968," 20 *St. Louis U.L.J.* 139 (1975); Bradford, "An Analysis of Underwriting and Appraisal Practices and Their Impact on Credit Availability," 3 *Real Estate Issues* 1 (1978); Bradford, "Financing Home Ownership: The Federal Role in Neighborhood Decline," 14 *Urb. Aff. Q.* 313 (1979); Federal Reserve System Compliance Handbook, Part I, Section 1 (1979); Potomac Institute, Lender's Guide To Fair Mortgage Policies 7-10, 17-24 (1980); Citizens' Commission on Civil Rights, A Decent Home: A Report on the Continuing Failure of the Federal Government To Provide Equal Housing Opportunity 7-11 (1983); Bradford, Report on the Role of the Veteran's Administration in Causing Rapid and Massive Racial Resegregation (1984).
2. S. Rep. No. 589, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. Code & Cong. & Admin. News 403, 405.
3. S. Rep. No. 187, 94th Cong., lst Sess. 1 (1975).
4. *Id.* at 2, 5-8.
5. *See, e.g.*, Shear & Yezer, "Discrimination in Urban Housing Finance: An Empirical Study Across Cities," 61 *Land Economics* 292, 300, 301 (1985); R. Schafer & H. Ladd, *Discrimination in Mortgage Lending* 7-8, 60, 134, 182-84, 222-24, 287-99 (1981).
6. Federal Reserve System Compliance Handbook at I.1.22 (1979); *see* R. Schafer & H. Ladd, *supra* note 5, at 6-7, 377 n.8; Ladd, "Equal Credit Opportunity: Women and Mortgage Credit," 72 *Am. Econ. Rev.* at 166-70 (1982); National Council of Negro Women, Inc., Women & Housing: A Report on Sex Discrimination in Five American Cities 59-73 (1975). Some lenders, for example, worried that single women could not perform the necessary repairs to maintain the property, but made no such assumptions with respect to men. Some lenders would provide mortgages to women only if a male cosigner was available, no matter what the financial status of the male might have been. Often lenders refused to recognize a wife's income, or would give it only half credit, a practice apparently motivated by the presumption that women would be likely to become pregnant and terminate their employment. Indeed, some banks required letters from doctors or affidavits concerning birth control methods, sterility, and intentions regarding abortions. Creditors were often unwilling to extend credit to a married woman in her own name. Creditors often required a single woman who had been granted credit to reapply for credit in her husband's name upon marriage. Women who were divorced or widowed encountered difficulties reestablishing their own credit. Federal Reserve System Compliance Handbook at I.1.22 (1979).
7. S. Rep. No. 589, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. Code Cong. & Admin. News 403, 405.
8. Bradford, Report on the Role of the Veterans Administration in Causing Rapid and Massive Racial Resegregation 16-17 (1984).
9. Board of Governors of the Federal Reserve System, 67th Annual Report, at 179-80 (1980).
10. For example, the percent of mortgage loans to blacks decreased from 4.1 percent in 1980 to 2.9 percent by June of 1983. This latter figure is striking when one considers that blacks own 7.2 percent of all owner-occupied housing according to the 1980 census. The same data shows that minorities were less likely to apply for loans, the applications that were made were less likely to be acted upon, and the applications were more likely to be rejected.
11. G. Squires & W. Velez, *Redlining and the Destabilization of Minority and Racially Mixed Communities* 9-11 (undated).
12. Woodstock Institute, "Partners in Need: A Four-Year Analysis of Residential Lending in Chicago and its Suburbs," at v (1986). *See also* Schlay, "Not in That Neighborhood: The Effects of Population and Housing on the Distribution of Mortgage Finance Within the Chicago SMSA," 17 *Soc. Sci. Res.* 137 (1988).
13. A. Schlay, "Maintaining the Divided City: Residential Lending Patterns in the Baltimore SMSA," 59 (1987).

14. *New York Times*, Dec. 5, 1988.

15. Community Reinvestment Act: Hearings Before the Senate Committee on Banking, Housing, and Urban Affairs, 100th Cong., 2d Sess. 124 (testimony of Elspeth Revere) (hereinafter 1988 CRA Hearings); *see* Woodstock Institute, "Vista of Opportunity: An Analysis of 1983 and 1984 Residential Lending in the Denver/Boulder SMSA," 35-36 (1987); Woodstock Institute, "Where the Money Flows: Lending Patterns in the Washington, D.C.-Maryland- Virginia SMSA," 91-92 (1985). *See* also I. Goldstein, *The Persistent Significance of Race: A City Suburb Comparison of Mortgage Lending in the Philadelphia Metropolitan Area* (1987).

16. Toledo Fair Housing Center, Mortgage Lending Report: 1980-1984 at 8, 29 (1986).

17. 1988 CRA Hearings, *supra* note 15, at 54-56.

18. *Detroit Free Press*, July 24, 1988, at 1.

19. *Id.*

20. *Atlanta Constitution*, May 1, 1988, at 1.

21. *See* 1988 CRA Hearings, *supra* note 15, at 110-11 (testimony of Calvin Bradford).

There are critics who still refer to redlining and mortgage discrimination as a "myth." In the late 1970s, the banking industry and federal regulators commissioned studies that purported to "explode" the myth of racially discriminatory redlining. *See*, e.g., Benston, Horsky, & Weingartner, *An Empirical Study of Mortgage Redlining*, Monograph 1978-5; Guttentag & Wachter, *Redlining and Public Policy*, Monograph 1980-1; King, *Discrimination in Mortgage Lending: A Study of Three Cities*, Monograph 1980-4. *See* also Benston, "The Persistent Myth of Redlining," *Fortune* (March 13, 1978) at 66-69. Yet these reports have themselves been harshly criticized, and have been accused of assuming as a given the proposition they are supposed to be testing. 1988 CRA Hearings, *supra* note 14, at 110. *See*, e.g., Guttentag & Wachter, *supra*, at 4 ("Redlining is a problem mainly because the private risk and cost of lending in redlined areas or to protected groups is excessive.")

One of the fundamental points of contention among the researchers has to do with the proper measurement of mortgage demand in inner-city neighborhoods. Because mortgage applications data is generally not publicly available, and because other evidence of mortgage demand is difficult to collect, statistical studies often rely on proxies to measure demand. Yet as Allen Fishbein, General Counsel of the Center for Community Change, has noted, the impressive success of many recent affirmative lending programs attests to the fact that a very active demand for credit exists in urban neighborhoods. 1988 CRA Hearings, *supra* note 14, at 449-50. Lenders themselves have admitted that the market for credit in these area is much greater than they had anticipated. *Atlanta Constitution*, May 4, 1988, at 1A. Moreover, the criticisms leveled at earlier redlining studies have, to a large degree, been answered in the more sophisticated recent studies that have used additional available data to control for other possible explanations of poor lending patterns, such as demand and market conditions.

22. The Attorney General's 1986 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, at 6; The Attorney General's 1987 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, at 3.

23. *Id.*

24. Board of Governors of the Federal Reserve System, 73rd Annual Report, 167 (1986); Board of Governors of the Federal Reserve System, 74th Annual Report, 158-59 (1987). Prior to 1986 regulated institutions had shown a steady increase in compliance with the requirements of Regulation B, reaching a high of 81 percent compliance in 1985. Board of Governors of the Federal Reserve System, 67th Annual Report, 177 (1980); Board of Governors of the Federal Reserve System, 68th Annual Report, 154 (1981); Board of Governors of the Federal Reserve System, 69th Annual Report, 155 (1982); Board of Governors of the Federal Reserve System, 70th Annual Report, 160 (1983); Board of Governors of the Federal Reserve System, 71st Annual Report, 153 (1984); Board of Governors of the Federal Reserve System, 72nd Annual Report, 151 (1985).

The most frequent violations of Regulation B are (a) failing to provide an adequate written notice of adverse action, (b) failing to provide notice of action taken within thirty days of receiving a completed application, (c) illegally requiring the signature of a spouse or cosigner, (d) failing to request information for monitoring purposes, and (e) illegally inquiring about the sex of an applicant.

25. *Compare* Board of Governors' 1983 and 1987 Annual Reports.

26. Letter from Robert L. Clarke, Comptroller of the Currency, to U.S. Rep. Frank Annunzio (undated).

27. Attachment to letter from Jerauld C. Kluckman, Director, Division of Compliance Programs, Federal Home Loan Bank System, to Stephen M. Dane (Aug. 26, 1988). In 1982 the Bank Board received 68 discrimination complaints. In 1987 it received 236. The percentage of these complaints that the Board found meritorious ranged from a low of 3 percent in 1983 to a high of 21 percent in 1982. *Id.*

28. Private mortgage insurers issue mortgage insurance that protects the lender should the borrower default, up to a specified amount (usually 20 percent of the loan amount). They play a significant role in the housing finance industry, for virtually all lenders and many states require private mortgage insurance for loans with less than 20 percent equity invested by the borrower.

29. As part of the mortgage loan transaction, the borrower signs a note requiring payment of the borrowed principal and interest to the lender. Like other forms of commercial paper, this note can be bought, sold, assigned, and transferred. Market activity in mortgage notes and related documents is called the secondary mortgage market or secondary market.

30. See 1988 CRA Hearings, *supra* note 15, at 24-27, 39-40, 260, 450; Kantor & Nystuen, "De Facto Redlining A Geographic View," 58 *Economic Geography* 309, 310-11 (1982).

31. *Id.*

32. *See*, e.g., Squires & Velez, "Insurance Redlining and the Transformation of an Urban Metropolis," 23 *Urb. Aff. Q.* 63 (1987); Badain, "Insurance Redlining and the Future of the Urban Core," 16 *Colum. J.L. & Soc. Probs.* 1 (1980); H.R. Rep. No. 865, 96th Cong., 2d Sess. 8 (1980).

33. *See* 1988 CRA Hearings, *supra* note 15, at 7 (statement of Senator Proxmire), 33 (statement of Gale Cincotta), 96 (statement of Calvin Bradford).

34. 42 U.S.C. § 3605. The new Fair Housing Amendments Act of 1988 will substantially revise the wording of § 3605 and will expand its coverage . Except where noted, however, the revisions should not affect the discussion that follows.

35. *See, e.g., Laufman v. Oakley Building & Loan Company*, 408 F. Supp. 489 (S.D. Ohio 1976); *Harrison v. Otto G. Heinzroth Mortgage Company*, 414 F. Supp. 66 (N.D. Ohio 1977). In one recent case, the plaintiffs were white sellers of property for which a mortgage loan application had been made, and the white realtor involved in the transaction. The applicants themselves were not even parties to the suit. *Old West End Association v. Buckeye Federal Savings & Loan*, Fair Housing-Fair Lending (P-H) Para. 15,548 (N.D. Ohio 1986). The plaintiffs there were injured because the lender forced a modification of the sales contract, allegedly based on the racial characteristics of the neighborhood in which the property was located, that required the sellers to reduce their sales price and, therefore, lose money on the transaction. That alleged harm to the sellers was enough, the court held, to assert a claim under the Fair Housing Act.

36. *See* H.R.1158, 100th Cong., 2d Sess., Cong. Rec. H6491-501 (daily ed. Aug. 8, 1988).

37. 42 U.S.C. § 3610(a) (repealed).

38. *Old West End Association v. Buckeye Federal Savings & Loan*, 675 F. Supp. 1100, 1103 (N.D. Ohio 1987) (neighborhood discrimination); *Thomas v. First Federal Savings Bank of Indiana*, 653 F. Supp. 1330, 1338 (N.D. Ind. 1987) (applicant discrimination).

39. *See, e.g., Conference of Federal Savings & Loan Associations v. Stein*, 604 F.2d 1256, 1258 (9th Cir. 1979), aff'd mem., 445 U.S. 921 (1980); *Thomas v. First Federal Savings Bank of Indiana*, 653 F. Supp. 1330, 1337 (N.D. Ind. 1987); *Harrison v. Otto G. Heinzroth Mortgage Co.*, 414 F. Supp. 66 (N.D. Ohio 1976); *Laufman v. Oakley Building & Loan Company*, 408 F. Supp. 489 (S.D. Ohio 1976). *See* also 73 A.L.R. Fed. 899.

40. *See, e.g.*, 12 C.F.R. § 528.2(a), § 528.3, § 531.8.

41. *See Lindsey v. Modern American Mortgage Corp.*, 383 F. Supp. 293 (N.D. Tex. 1973); *Harper v. Union Savings Association*, 429 F. Supp. 1254 (N.D. Ohio 1977).

42. *See, e.g., Love v. DeCarlo Homes, Inc.*, 482 F.2d 613 (5th Cir. 1973), cert. denied, 414 U.S. 1115 (1973); *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974), *on remand*, 409 F. Supp. 1274 (N.D. Ill. 1976), 706 F.2d 204 (7th Cir. 1983).

43. *Hanson v. Veterans Administration*, 800 F.2d 1381 (5th Cir. 1986); *United States v. American Institute of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978).

44. *Compare McDiarmid v. Economy Fire & Casualty Co.*, 604 F. Supp. 105 (S.D. Ohio 1984), and *Dunn v. Midwestern Indemnity MidAmerican Fire & Casualty Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979), 88 F.R.D. 191 (S.D. Ohio 1980), with *Mackey v. Nationwide Insurance Companies*, 724 F.2d 419 (4th Cir. 1984).
45. *Evans v. First Federal Savings Bank of Indiana*, 669 F. Supp. 915, 923-24 (N.D. Ind. 1987).
46. 15 U.S.C. § 1691.
47. 15 U.S.C. § 1691(e).
48. *Old West End Association v. Buckeye* Federal Savings & Loan, Fair Housing-Fair Lending (P-H) Par. 15,548 (N.D. Ohio 1986); *Evans v. First Federal Savings Bank of Indiana*, 669 F. Supp. 915 (N.D. Ind. 1987).
49. Gorman, "Enforcement of the Equal Credit Opportunity Act," 37 *Bus. Law*. 1335, 1345-48 (1982); Schellie, "Consumer Financial Services Law: Equal Credit Opportunity," 41 *Bus. Law*. 1029, 1037 (1986).
50. *See, e.g.*, *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026 (N.D. Ga. 1980). The regulatory agencies have emphasized that mortgage lending policies will be subject to analysis under the "effects test." *See* 12 C.F.R. § 202.6, 12 C.F.R. § 531.8, 12 C.F.R. § 701.31(e).
51. 15 U.S.C. § 1691c(d). The agencies are the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, the National Credit Union Administration, the Interstate Commerce Commission, the Civil Aeronautics Board, the Secretary of Agriculture, the Farm Credit Administration, the Securities & Exchange Commission, the Small Business Administration, and the Federal Trade Commission.
52. 15 U.S.C. § 1691e.
53. 42 U.S.C. §§ 1981, 1982, 1983.
54. *Evans v. First Federal Saving Bank of Indiana*, 669 F. Supp. 915 (N.D. Ind. 1987); *Contract Buyers League v. F & F Investment*, 300 F. Supp. 210 (N.D. Ill. 1969), aff'd on other grounds, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970); *cf. Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 n.10 (1968). One of the most expansive readings of § 1982 established the proposition that housing developers are prohibited by that section from "exploiting" a dual housing market created over the years by other actors in the market. *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974), *on remand*, 409 F. Supp. 1274 (N.D. Ill. 1976), 706 F.2d 204 (7th Cir. 1983).
55. The concept of race discrimination embodied in them is broad enough to include one's ethnic background or ancestry. *See St. Francis College v. Al-Khazragi*, 107 S.Ct. 2022 (1987); *Shaare Tefila Congregation v. Cobb*, 107 S.Ct. 2019 (1987).
56. 42 U.S.C. § 2000d.
57. One court has held that Title VI provides a private cause of action for geographic redlining against an institution subject to Federal Home Loan Bank Board regulations. *Laufman v. Oakley Building & Loan Company*, 408 F. Supp. 489 (S.D. Ohio 1976). Another has held, however, that Title VI does not provide a private cause of action to a rejected home repair loan applicant for alleged discrimination under a community development block grant program. *Nabke v. U.S. Department of Housing & Urban Development*, 520 F. Supp. 5 (W.D. Mich. 1981). *See also Allen v. Brodie*, 573 F. Supp. 87 (D. Md. 1983), *appeal dismissed*, 729 F.2d 1451 (1984) (dismissing action alleging discrimination in the implementation of city loan programs).
58. U.S. Commission on Civil Rights, The Federal Fair Housing Enforcement Effort 59 (1979).
59. 42 U.S.C. § 5309.
60. *Id.*
61. *Nabke v. U.S. Department of Housing & Urban Development*, 520 F. Supp. 5 (W.D. Mich. 1981).
62. 12 U.S.C. § 1735f-5(a).

63. A "federally related" mortgage loan is one that is secured by residential property designed for occupancy of from one-to- four families, and (1) is made by a lender whose deposits are insured by a federal agency or by a lender regulated by a federal agency, or (2) is insured, guaranteed, or assisted by HUD or any other agency of the federal government, or (3) is eligible for purchase by the Federal National Mortgage Association (FNMA), the Government National Mortgage Association (GNMA), or the Federal Home Loan Mortgage Corporation (FHLMA), or (4) is made by any "creditor" who makes or invests in residential real estate loans aggregating more than $1,000,000 per year. 12 U.S.C. § 1735f-7(b). The term "creditor" is defined to include a person or organization that regularly extends consumer credit payable in more than four installments and is the person or organization to whom the debt is initially payable. 15 U.S.C. § 1602(f).
64. 12 U.S.C. § 2801.
65. 12 U.S.C. § 2803. The term "depository institution" means commercial banks, savings and loan associations, and credit unions which make " federally related" mortgage loans. 12 U.S.C. § 2802 (2). *See* note 63 *supra*; 12 C.F.R. § 203.2(c). Non-depository institutions, such as mortgage companies that are unaffiliated with depository institutions, are not subject to the Act or any regulations promulgated under it.
66. S. Rep. No. 187, 94th Cong., 1st Sess. 2 (1975).
67. 12 U.S.C. § 2901.
68. *Id.* The Senate believed that existing law provided general authority to the federal financial supervisory agencies to assess a regulated lender's performance in meeting the credit needs of urban communities, but that the regulating agencies were not adequately doing so. S. Rep. No. 175, 95th Cong. 1st Sess. 33 (1977). The Senate Banking Committee criticized the Federal Home Loan Bank Board and other federal financial supervisory agencies for not monitoring lenders' performances in these areas. *Id.* at 33-35. The Committee reemphasized, as it did in promoting the enactment of the Home Mortgage Disclosure Act in 1975, the "amply documented cases of redlining."
69. *See, e.g.*, 12 C.F.R. § 543.2.
70. The Comptroller of the Currency has issued regulations implementing CRA (12 C.F.R. Part 25), ECOA and Title VIII (12 C.F.R. Part 27). The Federal Reserve Board has issued Regulation B implementing ECOA (12 C.F.R. Part 202) and Regulation C implementing HMDA (12 C.F.R. Part 203). The FDIC has issued regulations implementing ECOA and Title VIII (12 C.F.R. Part 338), and CRA (12 C.F.R. Part 345). The Federal Home Loan Bank Board has issued regulations implementing Title VIII and ECOA (12 C.F.R. Part 528), Title VI (12 C.F.R. Part 529), CRA (12 C.F.R. Part 563e) and the Federal Home Loan Bank Act (12 C.F.R. Sec. 531.8). The National Credit Union Administration has issued regulations implementing ECOA and Title VIII (12 C.F.R. § 701.31). The Small Business Administration has also issued nondiscrimination regulations implementing ECOA and Title VI (13 C.F.R. Part 113).
71. *See* generally U.S. Commission on Civil Rights, *supra* note 58, at 78, 82-88.
72. 12 C.F.R. Part 202.
73. 12 C.F.R. Part 528; 12 C.F.R. § 531.8.
74. For a more detailed discussion of the relative strengths and weaknesses of all of these regulations, see U.S. Commission on Civil Rights, *supra* note 58, at 82-88.
75. *See, e.g.*, U.S. Commission on Civil Rights, *supra* note 58; Citizens' Commission on Civil Rights, *supra* note 1.
76. This is not to suggest that other legislation of the 1980s has not had an indirect impact on equal credit access issues. To the contrary, deregulation of the financial industry and the secondary mortgage market in the early 1980s has had a profound impact on the ability of minorities and low-income applicants to obtain access to credit. *See, e.g.*, 1988 CRA Hearings, *supra* note 15, at 96-97, 107-08. An analysis of the indirect consequences of such legislation, however, is beyond the scope of this paper.
77. H.R. 1158, 100th Cong., 2d Sess., Cong. Rec. H6491-501 (daily ed. Aug. 8, 1988).
78. P.L. No. 100-242, 101 Stat. 1815.

79. *See* Art, "Social Responsibility in Bank Credit Decisions: The Community Reinvestment Act One Decade Later," 18 *Pacific L.J.* 1071, 1082 (1987); Potomac Institute, *supra* note 1, at 11; H.Rep. No. 561, 94th Cong., 2d Sess. 20 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News, 2303 2321; 1988 CRA Hearings, *supra* note 15, at 85, 450.
80. Citizens' Commission on Civil Rights, *supra* note 1, at 55-56.
81. *Id.* at 70-71.
82. *Id.*
83. *See* Schlay, *supra* note 12, at 141 n.3; 1988 CRA Hearings, *supra* note 15, at 107.
84. Board of Governors of the Federal Reserve System, 72nd Annual Report 147-49 (1985); Schellie, *supra* note 48, at 1029-35.
85. *See* 12 C.F.R. § 202.2(e); 12 C.F.R. § 202.13.
86. Board of Governors of the Federal Reserve System, 72nd Annual Report 147-48 (1985); Board of Governors of the Federal Reserve System, 73rd Annual Report 174-75 (1986); Schellie, *supra* note 49, at 1034-35. A recent legislative proposal by Rep. St. Germain, H.R. 5094, would require the Board to issue regulations requiring recordkeeping and adverse action notices with respect to business and commercial loans. *See* H.R. Rep. No. 822, 100th Cong., 2d Sess. 9 (1988). As of this writing, the bill is before the House Judiciary and Energy and Commerce Committees.
87. 52 Fed. Reg. 10733 (1987).
88. 53 Fed. Reg. 30831 (1988).
89. U.S. Commission on Civil Rights, *supra* note 58, at 90.
90. Ryker, Pol, & Guy, Racial Discrimination as a Determination of Home Improvement Loans, 21 *Urban Studies* 177 (1984).
91. *See* Section III *supra*. *See* also Schellie, *supra* note 49, at 1037.
92. U.S. Commission on Civil Rights, *supra* note 58, at 57-75; Washington Council of Lawyers, Reagan Civil Rights: The First Twenty Months 11-23 (undated); Citizens' Commission on Civil Rights, *supra* note 1, at 72-78.
93. U.S. Commission on Civil Rights, *supra* note 58, at 57-75.
94. *Id.* at 57. Between 1976 and 1982 the Department filed a total of only 12 cases under ECOA. Gorman, Enforcement of the Equal Credit Opportunity Act, 37 *Bus. Law.* 1335, 1345 (1982).
95. The court in that case held that the prohibitions of Title VIII apply to appraisers of real estate and to appraisal practices. *United States v. American Institute of Real Estate Appraisers*, 442 F. Supp. 1072, 1078-79 (1977), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978).
96. *Laufman v. Oakley Building & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976).
97. *Markham v. Colonial Mortgage Service Co.*, 605 F.2d 566 (D.C. Cir. 1979).
98. *United States v. Beneficial Corporation*, 492 F. Supp. 682 (D.N.J. 1980), *aff'd without opinion*, 673 F.2d 1302 (3d Cir. 1981); *United States v. American Future Systems, Inc.*, Civil Action No. 78-1517 (E.D.Pa., Jan. 29, 1981); *United States v. Great Western Bank & Trust*, Civil Action No. 80-1026-PHX-CLH (D. Ariz. May 13, 1981).
99. *Emigrant Savings Bank v. Elan Mgmt. Corp.* (E.D. N.Y.), discussed in The Attorney General's 1982 Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, at 3.
100. *U.S. v. Avco Financial Services*, C.A. No. Y-82-3032 (D. Md.).
101. *See* The Attorney General's 1980 Report to Congress pursuant to the Equal Credit Opportunity Act Amendments of 1976, at 3-6; The Attorney General's 1981 Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, at 1-4; The Attorney General's 1982 Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, at 2-3; The Attorney General's 1983 Report to Congress Pursuant to The Equal Credit Opportunity Act Amendments of 1976, at 2-3; The Attorney General's 1984 Report to Congress Pursuant to The Equal Credit Opportunity Act Amendments of 1976, at 2-4; The Attorney General's 1985 Report to Congress Pursuant to The Equal Credit Opportunity Act Amendments of 1976, at 1-5; The Attorney General's 1986 Report to Congress Pursuant to The Equal Credit Opportunity Act Amendments of 1976, at 1-3; The Attorney General's 1987 Report to Congress Pursuant to The Equal Credit Opportunity Act Amendments of 1976, at 1-5; The Attorney General's 1988 Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, at 1-3.

102. *Id.*

103. The decrees typically require affirmative action, such as the establishment of educational or training programs, recordkeeping and reporting, and relief for identifiable victims of the lender's discriminatory policies. *Id. See* also Gorman, *supra* note 94, at 1343.

The Department did conduct one trial in an equal credit case during the 1982 fiscal year. *United States v. American Future Systems, Inc.*, C.A. 78-1517 (E.D. Pa.). The case was filed four years earlier, in 1978. This is the only equal credit opportunity case the Department of Justice has ever litigated through trial.

104. *United States v. ITT Consumer Financial Corp.*, 816 F.2d 487 (9th Cir. 1987).

105. *See* Attorney General ECOA Reports, *supra* note 101.

106. *United States v. Landmark Financial Services,* 612 F. Supp. 623 (D. Md. 1985).

107. U.S. Commission on Civil Rights, *supra* note 58, at 57, 63-64. *But see* Gorman, *supra* note 94, at 1341 (suggesting that despite its lack of subpoena power, most creditors assist in the fact gathering process).

108. In 1982, for example, the Department rejected the use of statistical studies as "not an effective method" of enforcing the law, despite the U.S. Civil Rights Commission's strong recommendation in 1979 to do so. The Attorney General's 1983 Report to Congress Pursuant to The Equal Credit Opportunity Act Amendments of 1976, at 4. *See* U.S. Commission on Civil Rights, *supra* note 58, at 64-66.

109. Barefoot, Gorman, & Geary, "Enforcement and Litigation Under the Equal Credit Opportunity Act," 37 *Bus. Law*. 1351, 1353 (1982).

110. *See, e.g.*, Attorney General 1980 and 1981 ECOA Reports, *supra* note 101.

111. Attorney General ECOA Reports, *supra* note 101.

112. U.S. Commission on Civil Rights, *supra* note 58, at 61 n.29.

113. The Attorney General's 1980 Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, at 1.

114. *Id.*

115. The Attorney General's 1984 Report to Congress Pursuant to The Equal Credit Opportunity Act Amendments of 1976, at 1.

116. *Id.*

117. *Id.* Compare this to the staff of 17 attorneys and 17 paralegal and clerical employees assigned to the old Housing and Credit Section in 1977, which had no responsibilities in these other areas. U.S. Commission on Civil Rights, *supra* note 58, at 60.

118. Letter from Paul F. Hancock, Chief, Housing and Civil Enforcement Section, to Stephen M. Dane (August 22, 1988).

119. *Id.*

120. Washington Council of Lawyers, *supra* note 92, at 1-6, 17-23.

121. *Id.* at 19-22.

122. *See* discussion *infra*.

123. *See* discussion in Section II *supra*.

124. 42 U.S.C. § 3610(a).

125. 42 U.S.C. § 3610(c).

126. Letter from Burton Bloomberg, Associate General Counsel for Administrative and General Law, U.S. Department of Housing and Urban Development, to Stephen M. Dane (July 22, 1988).

127. *See* Citizens' Commission on Civil Rights, *supra* note 1, at 41.

128. 12 C.F.R. Part 202.

129. 12 C.F.R. Part 528; 12 C.F.R. § 531.8.

130. 15 U.S.C. § 1691c(a).

131. 12 U.S.C. § 2804(b).

132. 12 U.S.C. § 2902.

133. The following discussion excludes any analysis of the enforcement efforts of the National Credit Union Administration, which has no enforcement responsibility under CRA.

134. Art, *supra* note 79, at 1105-07. The Senate Committee on Banking, Housing, and Urban Affairs felt that existing law provided sufficient authority for the federal agencies to encourage lenders to meet the credit needs of their primary service areas, but that new legislation was necessary because the regulatory agencies "lack[ed] systematic, affirmative programs" to achieve that result. S. Rep. No. 175, 95th Cong., 1st Sess. 33-35 (1977). The Senate Committee had earlier noted that the Federal Home Loan Bank Board regulation prohibiting redlining had no practical effect because there existed no meaningful enforcement policy. S. Rep. No. 187, 94th Cong., 1st Sess. 10 (1975). *See* also Comment, *supra* note 1, at 146-50.

135. S. Rep. No. 175, 95th Cong., 1st Sess. 33 (1977).

136. Art, *supra* note 79, at 1106. *See* also *id.* at 1123 and n.218.

137. Mortimer, Current Developments in CRA Enforcement, 98 Bank. L. J. 604, 609 (1981); Art, *supra* note 79, at 1119.

138. Art, *supra* note 79, at 1115.

139. *See*, *e.g.*, 12 C.F.R. § 543.2(e).

140. Art, *supra* note 79, at 1095-1101.

141. *Id.* at 1108.

142. *See* generally 1988 CRA Hearings, *supra* note 15.

143. Each financial institution is rated on a scale of 1 to 5, with a 5 representing the lowest level of performance. Level 1 means the institution has a strong record of meeting community needs. Level 2 means the institution has an acceptable record of meeting community credit needs, although some encouragement to improve may be warranted. Levels 3 and 4 mean less than satisfactory and unsatisfactory performance, respectively. Level 5 means the institution's record is substantially inadequate. *See* Federal Reserve System Compliance Handbook, at II.1.55 (1982).

[illegible]. *For example*, despite the increasing evidence of a lack of commitment by financial institutions to provide for the credit needs of minority and urban communities, 97 percent of all regulated lenders were given high or satisfactory ratings by the banking agencies. 1988 CRA Hearings, *supra* note 15, at 7. In 1986 nearly 99 percent of the banks examined received passing CRA ratings, *id.* at 271, and in 1985 almost 99 percent of all thrifts examined received favorable ratings. *Id.* at 158. As early as 1983 the Federal Reserve Board's Consumer Advisory Council criticized the rating system. Unfortunately, the Board did not implement the Council's recommendations. *Id.* at 101, 158.

145. *Id.* at 20-22, 101-07, 154-57. All of the agencies have, since 1980, reduced the amount of resources dedicated to examining lender compliance with the community reinvestment statutes and regulations. According to Bank Watch, the combined manhours dedicated to consumer examinations by the Comptroller, the FDIC, and the Federal Home Loan Bank Board fell from approximately 808,335 in 1981 to only 209,881 in 1984, a decline of 74 percent. 1988 CRA Hearings, *supra* note 15, at 155. In 1982 the Comptroller abandoned a vigorous consumer compliance examination program in part "to contribute to [the Reagan] administration effort to reduce regulatory burdens in the market place." *Id.* at 250-51. While the Federal Reserve Board examined 894 of its 1,011 member state banks in 1980, in 1986 the Board conducted only 576 CRA reviews. Board of Governors of the Federal Reserve System, 74th Annual Report, at 162 (1987). Although the FDIC supervises nearly 9,000 banks, it has been able to conduct examinations of only approximately 20 percent of those banks each year, even in high examination volume years. *Id.* at 228, 230. *See* also Art, *supra* note 79, at 1108-09. The Federal Home Loan Bank Board and the FDIC admit that the crisis in the financial industry in the early 1980's has forced them to devote a substantial amount of their resources to safety and soundness concerns to the exclusion of CRA and other consumer-related issues. 1988 CRA Hearings, *supra* note 15, at 228, 266. The Comptroller acknowledges that its replacement examination program was "impaired" by an increase in bank failures and in the number of banks requiring special supervision. *Id. See* also Art, *supra* note 79, at 1111-12.

146. 1988 CRA Hearings, *supra* note 15, at 102-107, 160-63. In the entire decade after CRA was passed, only eight out of 40,000 applications for regulatory approval were denied by the agencies. *Id.* at 7. Between 1978 and 1987 the Federal Reserve Board received over 14,000 applications, 112 of which were CRA protested. *Id.* at 216. Despite the large volume of applications and protests, the board never denied an application only on CRA grounds. Since enactment of the CRA in 1977, the Comptroller's office has denied only 4 applications due to CRA factors. *Id.* at

251. None have been denied since 1981. *Id.* at 257. Since the CRA was passed the Federal Home Loan Bank Board has denied only one application on CRA grounds. *Id.* at 269. The Bank Board has routinely approved--sometimes with conditions, sometimes not-- applications from institutions with unsatisfactory CRA ratings. *Id.* at 271. The FDIC has denied only three applications due to CRA factors. *Id.* at 226. This accounts for .01 percent of the total number of applications the FDIC received that were subject to the CRA. *Id.* at 160-63, 226.

147. *Id.* at 255. The Comptroller is also credited with suggesting that competition, not regulation, will force banks to meet their community reinvestment obligations. *Id.* at 14.

148. *Id.* at 231. *See* also Art, *supra* note 79, at 1122.

149. Art, *supra* note 79, at 1139.

150. "Using Banks to Rebuild Neighborhoods," *Philadelphia Enquirer*, July 20, 1987; "Protests Haven't Stopped Bank Mergers," *American Banker*, Oct. 8, 1987; 1988 CRA Hearings, *supra* note 15, at 7. Between the time CRA was passed and 1985 more than 100 community reinvestment agreements had been struck. "Ten Years After Passage of the Community Reinvestment Act--A Resurgence of Interest?," *Perspectives* 10 (Summer/Fall 1986). For discussions of specific examples of community reinvestment agreements negotiated in response to CRA protests or threatened protests, see Weiss & Metzger, Neighborhood Lending Agreements: Negotiating and Financing Community Development, Lincoln Institute of Land Policy, Occasional Paper Series No. 88-06 (March 1988); Schellie, Current Developments With the Community Reinvestment Act, 42 *Bus. Law.* 943 (1987).

151. Art, *supra* note 79, at 1139; Comment, "Redlining Disinvestment and the Role of Mutual Savings Banks: A Survey of Solutions," 9 *Fordham Urban L.J.* 89, 116-17 (1980).

152. *See* Board of Governors of the Federal Reserve System, 67th Annual Report 177 (1980); Board of Governors of the Federal Reserve System, 68th Annual Report 154 (1981); Board of Governors of the Federal Reserve System, 69th Annual Report 156 (1982); Board of Governors of the Federal Reserve System, 70th Annual Report 160-61 (1983); Board of Governors of the Federal Reserve System, 71st Annual Report 153 (1984); Board of Governors of the Federal Reserve System, 72nd Annual Report 151 (1985); Board of Governors of the Federal Reserve System, 73rd Annual Report 167 (1986); Board of Governors of the Federal Reserve System, 74th Annual Report 159 (1987).

153. Schellie, *supra* note 49, at 1035-36. The FTC's leadership role in enforcement of ECOA is part of the statutory scheme. Section 704 of the Act places overall enforcement authority in the hands of the FTC, at least for those creditors that are not subject to regulatory oversight by one of the regulatory agencies listed in the Act. *See* 15 U.S.C. § 1691c. In addition, the FTC has broad administrative and enforcement powers other agencies lack. It can, for example, bring a lawsuit in its own name against a discriminating creditor. *See* 15 U.S.C. § 45 (M) (1) (A), § 57b. Finally, its interests are not as intertwined with the creditors it regulates as are the interests of other federal supervisory agencies.

154. *See* authorities cited in note 152 *supra*.

155. *Id.*

156. Board of Governors of the Federal Reserve System, 71st Annual Report 153 (1984).

157. *See, e.g.*, Board of Governors of the Federal Reserve System, 72nd Annual Report 151-52 (1985). It should be noted that the Federal Reserve Board has also endorsed the use of testing in determining whether a creditor is violating ECOA. Board of Governors of the Federal Reserve System, 71st Annual Report 150 (1984). It apparently does so, however, only after an examination has revealed possible illegal discrimination.

158. Two Federal Home Loan Bank Board regulations address the issue, but only sparingly. 12 C.F.R. § 528.4 prohibits any lender who is a member of a federal home loan bank from directly or indirectly engaging in any form of advertising which implies or suggests a policy of discrimination or exclusion in violation of the Fair Housing Act or the Equal Credit Opportunity Act. 12 C.F.R. § 531.8(d) cautions against the use of advertising or marketing practices that improperly restrict a lender's clientele to only certain segments of the community.

159. *See* Ga. Code Ann. § 8-3-202 (14) (1978); Ky. Rev. Stat. Ann. § 344.367 (1980); Ohio Rev. Code § 4112.02 (H) (4) (1988); Tenn. Code Ann. § 4-21-601 (A) (7) (B) (1984); Wis. Stat. Ann. § 101.22 (2) (1971).

160. Board of Governors of the Federal Reserve System, 72nd Annual Report 156-57 (1985).

Chapter XVII

1. 42 U.S.C. § 3601-3619 (1982 and Supp. 1987).
2. *Id.* at §§ 3603-3606, 3610-3613. "Sex" was added to Title VIII as a prohibited basis for discrimination by a 1974 amendment.
3. 392 U.S. 409 (1968).
4. 42 U.S.C. § 1981 and § 1982.
5. *E.g., Buchanan v. Warley*, 245 U.S. 60 (1917) (racial zoning); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (restrictive covenants); *Gautreaux v. Chicago Housing Authority*, 265 F. Supp. 582 (N.D. Ill. 1967) and 296 F. Supp. 907 (N.D. Ill. 1969) (segregated public housing).
6. This section is based in part on Schwemm, "Private Enforcement and the Fair Housing Act, " VI *Yale Law & Policy Rev.* 375 (1988).
7. *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413-16 (1968).
8. 42 U.S.C. § 3613.
9. *Id.* at § 3610.
10. *Id.* at § 3612.
11. *Id.* at § 3608. Suits against HUD under §808 are discussed in Part III-D *infra*.
12. 5 U.S.C. § 701 *et seq. See, e.g., NAACP, Boston Chapter v. HUD*, 817 F.2d 149 (1st Cir. 1987).
13. 42 U.S.C. § 3613.
14. *United States v. Hunter*, 459 F.2d 205, 217 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972); *see generally* Schwemm, *Housing Discrimination Law*, at 281-86 (1983).
15. An analysis of the number of Justice Department cases filed under Title VIII during the past 20 years is contained in sections B and C-1 of Part II *infra*.
16. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972).
17. *See* U.S. Department of Housing and Urban Development, *1979 Statistical Yearbook*, at 43, and *1987 Annual Report*, at 21. A more detailed discussion of the number of § 810 claims filed over the past 10 years is contained in Part III-B-1, *infra*.
18. *See* 42 U.S.C. § 3610(c). For a list of those states and localities whose fair housing laws have been determined by HUD to be substantially equivalent to Title VIII, see Prentice-Hall, *Fair Housing--Fair Lending Rptr.* ¶ 4251.11.
19. 42 U.S.C. § 3610(a).
20. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972).
21. "Given the advantages to the claimaint of proceeding under § 812, it is hard to imagine why anyone would *voluntarily* proceed under § 810 if both routes were equally available." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 125 (1979) (Rehnquist, J., dissenting).
22. *E.g., Huntington Branch, NAACP v. Town of Huntington*, 689 F.2d 394 n.3 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983); *Royster v. Martin*, 562 F. Supp. 623, 624 (S.D. Tex. 1981); *see also Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 104-06 (1979).
23. 42 U.S.C. § 3612(a), (c). The 1988 Fair Housing Amendments Act eliminated Title VIII's cap on punitive damages and the financial inability requirement for attorneys' fees awards in private lawsuits. *See* § 813(c) of the Fair Housing Act, as amended by the 1988 Fair Housing Amendments Act.
24. "[C]omplaints by private persons are the primary method of obtaining compliance with the Act." *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972).
25. The Supreme Court cases are *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Curtis v. Loether*, 415 U.S. 189 (1974); and *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). Some of the more important lower court decisions in privately-initiated Title VIII cases are cited in Schwemm, *supra* note 6, at 378-79 nn.23-32.
26. *See* Schwemm, *supra* note 6, at 378-79.
27. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972).
28. *See* Schwemm, *supra* note 6, at 379-81.

29. The courts have fully endorsed the use of testers to investigate and prove allegations of housing discrimination. *E.g.*, *Havens Realty v. Coleman*, 455 U.S. 363 (1982); *Richardson v. Howard*, 712 F.2d 319, 321-22 (7th Cir. 1983); *Grant v. Smith*, 574 F.2d 252, 254 n.3 (5th Cir. 1978) (and cases cited); *Hamilton v. Miller*, 477 F.2d 908, 910 n.1 (10th Cir. 1973). Testing is discussed in greater detail in Parts III-C-3 and -4 *infra*.

30. *See, e.g.*, *Douglas v. Metro Rental Services, Inc.*, 827 F.2d 252, 256-57 (7th Cir. 1987) (reducing compensatory damage award for each plaintiff's mental and emotional distress form $10,000 to $2,500); *see generally* Schwemm, "Compensatory Damages in Fair Housing Cases," 16 Harv. C.R. -C.L. L. Rev. 83 (1981). There are some noteworthy exceptions. *E.g.*, *Grayson v. S. Rotundi & Sons*, P-H: *Fair Housing--Fair Lending Rptr.* ¶ 15,516 (E.D.N.Y. 1984) (upholding jury verdict of $65,000 in compensatory damages and $500,000 in punitive damages to two plaintiffs); *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 191 (7th Cir. 1982) (out-of-pocket damages of $2,675, emotional distress damages of $10,000 to each of two plaintiffs, and punitive damages of $100,000 against each of two defendants); *Willis v. H & M Enterprises*, $325,000 settlement reported in the *Washington Post*, at E1 (Oct. 31, 1985).

31. *See* Farley, "The Residential Segregation of Blacks from Whites: Trends, Causes, and Consequences," *Issues in Housing Discrimination*, Vol. 1, at 18 (U.S. Commission on Civil Rights 1985).

32. *Id.* at 17-18.

33. *Id.* at 18.

34. *Id.*

35. *Id.* at 19.

36. *Id.* *See also* Turner & Page, "Metropolitan Housing Opportunities for Poor and Working Class Minorities," *Urban Institute Project Report* No. 3730-04, at 2 (Oct. 1987) (concluding that "Hispanics do not appear to confront the same degree of housing discrimination in the suburbs as blacks.").

37. *See* McKinney & Schnare, "Trends in Residential Segregation by Race: 1960 1980," *Urban Institute Project Report* No. 3727, at 13 (Oct. 1986).

38. *E.g.*, U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *Discrimination Against Chicanos in the Dallas Rental Housing Market: An Experimental Extension of the Housing Market Practices Survey* (1979); Colorado Civil Rights Division, *Discrimination, Segregation and Minority Housing Conditions in Sunbelt Cities: A Study of Denver, Houston and Phoenix* (1983); *see also* James & Tynan, "Segregation and Discrimination of Hispanic Americans: An Exploratory Analysis," in *Housing Desegregation and Federal Policy* (J. Goering ed. 1986), at 94 (evidence "suggests that the housing options of Hispanics are curtailed by segregation and discrimination as much as those of blacks.").

39. This history of racial migration and segregation in the United States is taken from Taeuber, "The Contemporary Context of Housing Discrimination," VI *Yale Law & Policy Rev.* 339 (1988). *See also* Hirsch, "The Causes of Residential Segregation: A Historical Perspective," *Issues in Housing Discrimination*, Vol. 1, at 56 (U.S. Commission on Civil Rights 1985).

40. Eventually, the Supreme Court held racial zoning and the judicial enforcement of restrictive covenants unconstitutional. *Buchanan v. Warley*, 245 U.S. 60 (1917) (racial zoning); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (restrictive covenants).

41. U.S. Federal Housing Administration, *Underwriters Manual*, at 935 (1938). *See also* Kushner, "An Unfinished Agenda: The Federal Fair Housing Enforcement Effort," VI *Yale Law & Policy Rev.* 348, 350 (1988).

42. *See* Taeuber, *supra* note 39, at 341-42.

43. *Id.* at 341.

44. McKinney & Schnare, *supra* note 37, at 1, 5, 7.

45. National Advisory Commission on Civil Disorders, *Report of the National Advisory Commission on Civil Disorders*, at 1 (1968).

46. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972).

47. Darden, "Accessibility to Housing: Differential Residential Segregation for Blacks, Hispanics, American Indians, and Asians," in *Race, Ethnicity, and Minority Housing in the United States*, at 112 (J. Momeni ed. 1986).

48. Lamb, "Equal Housing Opportunity," in *Implementation of Civil Rights Policy*, at 148 (C. Bullcock & C. Lamb eds. 1984).
49. 114 *Cong. Rec.* 2276 (1968).
50. *Id.* at 3422.
51. *Id.* at 9559.
52. *Id.* at 9591.
53. *Id.* at 2275 (remarks of Senator Mondale).
54. *Id.* at 2706.
55. *See* Taeuber, *supra* note 39, 343-44.
56. *See, e.g.*, Muth, "The Causes of Housing Segregation," *Issues in Housing Discrimination*, Vol. 1, at 3 (U.S. Commission on Civil Rights 1985).
57. Wienk, Reid, Simonson & Eggers, *Measuring Racial Discrimination in American Housing Markets: The Housing Market Practices Survey* (U.S. Department of Housing and Urban Development 1979).
58. These studies are cited and summarized in *Report 100-711: The Fair Housing Amendments Act of 1988*, Committee on the Judiciary, U.S. House of Representatives, 100th Cong., 2d Sess., at 15 (June 17, 1988).
59. *See* testimony of John J. Knapp, General Counsel, U.S. Department of Housing and Urban Development, in *Issues in Housing Discrimination*, Vol. 2, at 107 (U.S. Commission on Civil Rights, Nov. 13, 1987).
60. *See, e.g.*, Farley, *supra*, note 31; Taeuber, *supra* note 39; Muth, *supra*, note 56; Kain, "The Influence of Race and Income on Racial Segregation and Housing Policy," and Galster, "More than Skin Deep: The Effect of Housing Discrimination on the Extent and Pattern of Racial Residential Segregation in the United States," in *Housing Desegregation and Federal Policy* (J. Goering ed. 1986).
61. Farley, *supra* note 31, at 20; *see also* Kain, *supra* note 60, at 115 ("[V]irtually every systematic study has concluded that black and white differences in income and other socioeconomic variables account for very little of current and past patterns of racial residential segregation."); Turner & Page, *supra* note 36, at 44 ("black families who can afford suburban housing remain systematically concentrated in central cities.").
62. *E.g.*, Farley, *supra* note 31, at 23 (comparing black-white to Asian-white segregation levels).
63. Taeuber, *supra* note 39, at 345.
64. Galster, *supra* note 60, at 133-34. *See also* Turner & Page, *supra* note 36, at 45 ("[I]t is racial discrimination or prejudice that prevents households from taking advantage of affordable housing opportunities in the suburbs.").
65. *See, e.g.*, U.S. House of Representatives, Committee on the Judiciary, *Report 100-711: The Fair Housing Amendments Act of 1988*, at 15-17, 100th Cong., 2d Sess. (June 17, 1988).
66. *See* note 50 *supra* and accompanying text.
67. For another description of the 1988 Amendments Act, *see* "Major Provisions of Fair-Housing Legislation," at 46 *Congressional Quarterly--Weekly Report*, at 2348-50 (Aug. 20, 1988).
68. The House passed the Fair Housing Amendments Act by a vote of 376-23 on June 29. *See* 134 *Cong. Rec.* H 4931 (1988). The Senate passed an amendment version of this bill by a 94-3 vote on August 2. *Id.* at S 10562. The House concurred in the Senate version on August 8. *Id.* at H 6501.
69. *See* Sec. 13(a) of the Fair Housing Amendments Act of 1988.
70. *See* § 804, § 805, § 806, and § 818 of the Fair Housing Act, as amended by the Fair Housing Amendments Act of 1988.
71. *Id.* at § 804 (f) (3)(A) and (C).
72. *Id.* at § 807(b).
73. *Id.* at § 810(a) (1) (B) (iv), § 810(f).
74. *Id.* at § 810(b) (5) (A), § 8109(g) (1).
75. *Id.* at § 810(b).
76. *Id.* at § 810(g) (2) (A).

77. *Id.* at § 812(a), § 812(o).
78. *Id.* at § 812(b), § 812(g) (1).
79. *Id.* at § 812(g) (2)-(3), § 812(p).
80. *Id.* at § 812(h)-(i).
81. *Id.* at § 814(b).
82. *Id.* at § 814(d) (1).
83. *E.g.*, *United States v. Rent-A-Homes Systems of Illinois*, 602 F.2d 795 (7th Cir. 1979).
84. *See* U.S. House of Representatives, Committee on the Judiciary, Report 100-711: the Fair Housing Amendments Act of 1988, at 42-43, 100th Cong., 2d Sess. (June 17, 1988). This estimate was made before the "removal" provision and certain other Justice Department responsibilities were added to the bill.
85. *See* § 813 of The Fair Housing Act, as amended by The Fair Housing Amendments Act of 1988.
86. *Id.* at § 813(a) (1)(A), § 813(c).
87. 108 S.Ct. 1419 (1988).
88. *See* § 805 of The Fair Housing Act, as amended by The Fair Housing Amendments Act of 1988.
89. *See id.* at § 802 (f) and (i), § 810(a) (1)(A)(i), § 813(a)(1)(A), and § 818.
90. *See* 42 U.S.C. § 3617.
91. Sec. 13(b) of The Fair Housing Amendments Act of 1988. This requirement is discussed in Part III-C-1 *infra*.
92. *See* § 808(e)(2)(A) and § 808(e)(6) of The Fair Housing Act, as amended by The Fair Housing Amendments Act of 1988. This requirement is discussed in Part III-C-2 *infra*.
93. 42 U.S.C. § 3613. *See* notes 13 and 14 and accompanying text *supra*.
94. *See* § 810(g)(2)(C), § 812(o), and § 814 of the Fair Housing Act, as amended by the 1988 Fair Housing Amendments Act.
95. 42 U.S.C. § 3631.
96. *See* Fair Housing Amendments Act of 1979: Hearings on H.R. 2540, before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 96th Cong. 1st Sess., at 3 (1979) (statement of Drew S. Days, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice).
97. *E.g.*, *United States v. Mitchell*, 580 F.2d 789 (5th Cir. 1978) (steering); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (exclusionary zoning); *United States v. American Inst. of Real Estate Appraisers*, 442 F.Supp. 1072 (N.D. Ill. 1977), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978) (discriminatory appraisals); *United States v. Youritan Construction Company*, 370 F. Supp. 544 (N.D. Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1973) (delaying tactics and burdensome applications procedures directed against minority applicants).
98. *United States v. Hunter*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).
99. *E.g.*, *United States v. Northside Realty Associates, Inc.*, 474 F.2d 1164, 1168 (5th Cir. 1973); *United States v. L & H Land Corp., Inc.*, 407 F. Supp. 576, 578-80 (S.D. Fla. 1976).
100. *E.g.*, *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Pelzer Realty Company, Inc.*, 484 F.2d 438, 443 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).
101. *E.g.*, *United States v. West Peachtree Tenth Corporation*, 437 F.2d 221, 228-31 (5th Cir. 1971).
102. *E.g.*, *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 206 (1972); *Fort v. White*, 530 F.2d 1113, 1118-19 (2d Cir. 1976).
103. *See, e.g.*, notes 31-34, 47, and 57 and accompanying text *supra*.
104. See, U.S. Department of Justice, 1981 Annual Report of the Attorney General of the United States at 131 nn.59 & 64. The *Birmingham* and *Yonkers* cases are reported, respectively, at *United States v. City of Birmingham, Michigan*, 538 F. Supp. 819 (E.D. Mich. 1982), *aff'd as modified*, 727 F.2d 560 (6th Cir.), *cert. denied*, 469 U.S. 821 (1984); and *United States v.* Yonkers Board of Education, 624 F. Supp. 1276 (S.D. N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988), *stay as to contempt fines granted in part and denied in part*, 57 LW 3183 (1988).

105. *See, e.g.*, U.S. Department of Justice, 1981 Annual Report of the Attorney General of the United States, at 124-26.

106. *See* U.S. Department of Justice, 1982 Annual Report of the Attorney General of the United States, at 125, 131 nn.57-60.

107. *See* U.S. Department of Justice, 1982 Annual Report of the Attorney General of the United States, at 158-59, 163 nn.52-53.

108. *See* 1982 DOJ Authorization Hearings, before the Subcommittee on Civil and Constitutional Rights, House Judiciary Committee (statement of Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice) (stating, *inter alia*, that housing cases are not a priority).

109. Case filing statistics for the years 1981-1986 are taken from U.S. Department of Justice, 1981-1986 Annual Reports of the Attorney General of the United States, as follows: 1981 Annual Report, at 125, 131 nn.57-60; 1982 Annual Report, at 158; 1983 Annual Report, at 136; 1984 Annual Report, at 149; 1985 Annual Report, at 167; 1986 Annual Report, at 129. The 1987 figure was reported in P-H; *Fair Housing--Fair Lending Rptr.*, Bulletin for Mar. 1, 1988, at 4).

110. Letter from Mark R. Disler, Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, *Legal Times*, at 18 (June 13, 1988).

111. *See* U.S. Department of Justice, 1984 Annual Report of the Attorney General of the United States, at 148-49.

112. Letter from Mark R. Disler, *supra* note 110.

113. *See* U.S. Department of Justice, 1985 Annual Report of the Attorney General of the United States, at 167, 170-71 n.47. The Justice Department is authorized to bring group pattern or practice suits under 42 U.S.C.§ 3613. *E.g., United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.) *cert. denied*, 414 U.S. 826 (1973).

114. *See, e.g.*, U.S. Department of Justice, 1983-1986 Annual Reports of the Attorney General of the United States, as follows: 1983 Annual Report, at 136; 1984 Annual Report, at 149; 1985 Annual Report, at 167; 1986 Annual Report, at 129-30.

115. *Id.*

116. *Id.* The cases involving women and American Indians are reported in the 1983 Annual Report of the Attorney General of the United States, at 136, 140 nn.35 & 40.

117. *See, e.g.*, letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to John Knapp, General Counsel, U.S. Department of Housing and Urban Development (March 4, 1983) ("Absent evidence of intentional discrimination, we would not file a suit pursuant to the Attorney General's pattern or practice authority under Title VIII"); memorandum of Wm. Bradford Reynolds to staff attorneys J. Harvie Wilkinson III and Thomas M. Keeling, concerning DOJ's possible intervention in the *West Zion Highlands* case (March 16, 1983) (Reynolds refuses to authorize intervention absence proof of discriminatory intent, because, in his view, Title VIII does not reach "effect" cases.); *See* also Selig, "The Justice Department and Racially Exclusionary Municipal Practices: Creative Ventures in Fair Housing Enforcement," 17 *U.C. Davis L. Rev.* 445, 474 n.128, 486 n.193 (1984).

118. *See, e.g., Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert, denied*, 434 U.S. 1025 (1978) ("attempts to discern the intent of an entity such as a municipality are at best problematic"); *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1064-65 (4th Cir. 1982).

119. *See* notes 144-160 and accompanying text *infra*.

120. *United States v. Town of Manchester, Connecticut*, C.A. No. H-79-229 (D. Conn. 1981), reported in U.S. Department of Justice, 1982 Annual Report of the Attorney General of the United States, at 159, 163 n.58.

121. *United States v. City of Birmingham, Michigan*, 538 F. Supp. 819 (E.D. Mich. 1982), *aff'd as modified*, 727 F.2d 560 (6th Cir.), *cert. denied*, 469 U.S. 821 (1984); *United States v. Yonkers Board of Education*, 624 F. Supp. 1276 (S.D. N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 2821 (1988).

122. Accord: statements attributed to Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, in "Wide Use of Yonkers Tactic Unlikely, U.S. Official Says," *New York Times*, at B2 (Sept. 23, 1988) ("other communities have little reason to fear similar legal pressure"; Yonkers is "the only one [of the DOJ's pending cases] brought against a municipality.").

123. *See* U.S. Department of Justice, 1981 Annual Report of the Attorney General of the United States, at 125; 1982 Annual Report, at 158-59; 1985 Annual Report, at 167; *see* also 1983 Annual Report, at 136 (5 new cases and 5 settlements), and 1986 Annual Report, at 129 (12 new cases and 11 settlements).

124. *See, e.g.*, U.S. Department of Justice, 1986 Annual Report of the Attorney General of the United States, at 129 and 132 nn.30-33 & 35 (consent decree filed on same date as complaint in 5 of 12 new cases); 1985 Annual Report, at 167 (4 settlements in newly filed cases were resolved "through pre-suit negotiations and consent decrees [that] were filed simultaneously with the complaints.").

125. U.S. Department of Justice, 1986 Annual Report of the Attorney General of the United States, at 125; 1985 Annual Report, at 161; 1984 Annual Report, at 145; *See also*, 1983 Annual Report, at 131.

126. *See, e.g.*, U.S. Department of Justice, Civil Rights Division, *Enforcing the Law: January 20, 1981--January 31, 1987*, at 112 (listing the elements of relief usually obtained in a Title VIII consent decree during the Reagan Administration); notes 164-168 and accompanying text *infra*. The other potential advantage of settlement--that relief can be obtained with greater speed and less cost than through litigation--was also not a major need of the federal fair housing enforcement efforts in the 1980s.

127. *See* P-H: *Fair Housing--Fair Lending Rptr.*, Bulletin for Mar. 1, 1988, at 4.

128. *See, e.g.*, U.S. Department of Justice, Civil Rights Division, Enforcing the Law: January 20, 1981--January 31, 1987, at 111; U.S. Department of Justice, 1985 Annual Report of the Attorney General of the United States, at 167.

129. The three cases from the Carter Administration were *United States v. City of Parma, Ohio*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *United States v. City of Birmingham, Michigan*, 727 F.2d 560 (6th Cir.), *cert. denied*, 469 U.S. 821 (1984); and *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 282 (1988). The one case filed during the Reagan Administration was *United States v. Starrett City Associates*, 840 F.2d 1096 (2nd Cir. 1988). The *Starrett City* case is discussed in Part II-C-4 *infra*.

130. The Justice Department in the early years of the Reagan Administration did file some *amicus* briefs on behalf of fair housing groups and other plaintiffs in important private cases. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 366 (1982); *Education Instruction v. Copley Management and Development Corp.*, C.A. No. 81-0532 (D. Mass. 1982), reported in U.S. Department of Justice, 1982 Annual Report of the Attorney General of the United States, at 159 n.60. This practice was reversed during the later Reagan years, and indeed the Department recently filed an *amicus* brief on behalf of defendants who are seeking a narrowing construction of Title VIII in an exclusionary zoning case. *See* note 133 and accompanying text *infra*.

131. *See* note 117 and accompanying text *supra*.

132. *See* cases cited in notes 148-160 and accompanying text *infra*.

133. *See* Brief for the United States in support of the defendants' appeal to the Supreme Court in *Huntington Branch, NAACP v. Town of Huntington*, 844 F.3d 926 (2d Cir.), *appeal filed*, 57 LW 3011 (1988).

134. Currently, the Supreme Court is being asked to review this issue in *Huntington Branch, NAACP v. Town of Huntington*, 844 F.3d 926 (2d Cir. 1988), *appeal filed*, 57 LW 3011 (1988).
The issue has been addressed in a number of articles. *E.g.*, Schwemm, "Discriminatory Effect and the Fair Housing Act," 54 *Notre Dame Lawyer* 199 (1978); Comment, "A Last Stand on Arlington Heights: Title VIII and the Requirement of Discriminatory Intent," 53 *N.Y.U.L. Rev.* 150 (1978); Note, "Justifying a Discriminatory Effect under the Fair Housing Act: A Search for the Proper Standard," 27 *U.C.L.A. L. Rev.* 398 (1979); four papers prepared by, respectively, John O. Clamore, Marshall D. Stein, Otto J. Hetzel, and Douglas W. Kmiec for a consultation-hearing of the U.S. Commission on Civil Rights in 1985 entitled Issues in Housing Discrimination: A Consultation/Hearing, Vol. 1, at 77-142 (U.S. Commission on Civil Rights, November 12-13, 1985).

135. *See* 42 U.S.C. § 3604-§ 3605. The phrase "because of" is used in § 3604(a), § 3604(b), § 3604(d), and § 3605; § 3604(c) is directed toward discrimination "based on" race and other prohibited grounds; and § 3606 uses the words "on account of." The Fair Housing Amendments Act of 1988 extends the protections afforded by these provisions to families with children and the handicapped. *See* notes 70-72 and accompanying text *supra*.

136. 401 U.S. 424 (1971).

137. *Id.* at 429-30.

138. A paper by Marshall D. Stein published in 1985 by the U.S. Commission on Civil Rights argues, to the contrary, that the legislative history of Title VIII demonstrates that the statute was intended to be governed solely by a discriminatory intent standard. *See* Stein, "The Fair Housing Act of 1968 and the Civil Rights Act of 1866: The Test for Liability in Housing Discrimination Cases," Issues in Housing Discrimination: a Consultation/Hearing, Vol. 1, at 94-114 (U.S. Commission on Civil Rights, November 12-13, 1985). This paper represents a minority view and is, on close analysis, not convincing. For an effective rebuttal of the Stein paper, see Hetzel, "A Perspective on Legal Issues in Housing Discrimination," Issues in Housing Discrimination: A Consultation/Hearing, Vol. 1, at 116-120 (U.S. Commission on Civil Rights, November 12-13, 1985).

139. *See* Schwemm, *supra* n.134, at 210-211.

140. 42 U.S.C. § 3601.

141. 114 Cong. Rec. 2699 (1968).

142. 409 U.S. 205, 209 (1972).

143. *Id.* at 209, 211, 212.

144. 564 F.2d 126, 146-49 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

145. 493 F.2d 799, 808 (5th Cir. 1974). *See also United States v. Pelzer Realty Company Inc.*, 484 F.2d 438, 443 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

146. *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

147. 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

148. *Joseph Skillken & Co. v. City of Toledo*, 528 F.2d 867 (6th Cir. 1975), *vacated and remanded*, 429 U.S. 1068, *decision adhered to*, 558 F.2d 350 (6th Cir.), *cert. denied*, 434 U.S. 985 (1977).

149. 509 F.2d 1110, 1114 (2d Cir.), *rehearing denied*, 517 F.2d 918 (2d Cir.), *cert. denied*, 423 U.S. 896 (1975).

150. 610 F.2d 1032, 1036-37 (2d Cir. 1979).

151. 682 F.2d 1055, 1065 (4th Cir. 1982).

152. 736 F.2d 983, 986-88 (4th Cir. 1984).

153. 672 F.2d 1305, 1311 (9th Cir. 1982).

154. *See Bonner v. City of Pritchard, Alabama*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*).

155. 661 F.2d 562, 574 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).

156. 782 F.2d 565, 574 (6th Cir. 1986).

157. 840 F.2d 1096, 1100 (2d Cir. 1988).

158. 844 F.3d 926, 934-37 (2d Cir.), *appeal filed*, 57 LW 3011 (1988).

159. 736 F.2d 983 (4th Cir. 1984).

160. 844 F.3d 926, 937-38 (2d Cir.), *appeal filed*, 57 LW 3011 (1988).

161. Indeed, the Department has recently filed an *amicus* brief opposing the discriminatory effect theory in an important private case. *See* note 133 and accompanying text *supra*.

162. This policy was explicitly set forth in the Civil Rights Division's section of various Annual Reports of the Attorney General during the Reagan Administration. *E.g.*, 1985 Annual Report of the Attorney General, at 161; 1984 Annual Report of the Attorney General, at 145.

163. Such preferential plans are not to be confused with a housing supplier's limiting minorities to certain specified units, which is commonly known as "steering" and is clearly prohibited by Title VIII. *E.g.*, *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135, 139-41 (6th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986); *United States v. Mitchell*, 580 F.2d 789, 791-92 (5th Cir. 1978).

164. *See Shimkus v. Gersten Companies*, 816 F.2d 1318 (9th Cir. 1987).

165. *Id.* at 1319.
166. The Justice Department's brief in *Gersten* argued that Title VIII permits "no exception from the nondiscrimination principle, regardless of the race of the person disadvantaged by such an exception and regardless of the justification offered for the exception." Brief for the United States, at 19, *Shimkus v. Gersten Companies*, 816 F.2d 1318 (9th Cir. 1987).
167. 816 F.2d at 1320-22.
168. *Id.* at 1322.
169. *United States v. Charlottesville Redevelopment and Housing Authority*, C.A. No. 86-0033-C (W.D. Va. complaint filed Aug. 8, 1986). Similar suits have been filed against public housing authorities in Holyoke, Massachusetts (*see United States v. Holyoke Housing Authority*, C.A. N. 85-0439-1 (D. Mass. complaint and consent decree filed Nov. 21, 1985) and Farmville, North Carolina (*see Trends in Housing*, Vol. 26, No. 2, at 5 (Aug.-Sept. 1987)).
170. *See* Kentucky Commission on Human Rights' Staff Report 88-4, Kentucky's Public Housing Authorities Continue to Reduce Segregation: 1987, at 1 (April 1988).
171. *United States v. Housing Authority of Owensboro*, C.A. No. 78-0178-0(B) (W.D. Ky. agreed order of settlement signed May 1980). Another resulted from lengthy litigation initiated by the state human rights commission. *See Middleboro Housing Authority v. Kentucky Commission on Human Rights*, 553 S.W.2d 57 (Ky. App. 1977).
172. *See* Kentucky Commission on Human Rights' Staff Report 88-4, Kentucky's Public Housing Authorities Continue to Reduce Segregation: 1987, at 1-3 (April 1988).
173. *See* U.S. Department of Housing and Urban Development, 1987 Annual Report, at 22.
174. *See Burney v. Housing Authority of County of Beaver*, 551 F. Supp. 746 (W.D. Pa. 1982) (housing authority's race-conscious integration plan not sufficiently narrowly tailored to comply with Title VIII and the Equal Protection Clause).
175. *E.g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).
176. *United States v. Starrett City Associates*, 840 F.2d 1096 (2d Cir. 1988); *United States v. Atrium Village Associates*, No. 87 C 6527 (N.D. Ill. complaint filed July 23, 1987).
177. The trial court opinion in the *Starrett City* case is reported at 660 F. Supp. 668 (E.D. N.Y. 1987), *aff'd*, 840 F.2d 1096 (2d Cir. 1988). Earlier decisions in the case include *United States v. Starrett City Associates*, 605 F. Supp. 262 (E.D. N.Y. 1985); and *Arthur v. Starrett City Associates*, 89 F.R.D. 542 (E.D.N.Y. 1981), and 98 F.R.D. 500 (E.D. N.Y. 1985). These decisions form the basis for the factual background presented in this section.
178. *See Arthur v. Starrett City Associates*, 89 F.R.D. 542 (E.D. N.Y. 1981), and 98 F.R.D. 500 (E.D. N.Y. 1985).
179. 660 F. Supp. 668 (E.D. N.Y. 1987), *aff'd*, 840 F.2d 1096 (2d Cir. 1988).
180. *Id.* at 673.
181. *See id.* at 677 (citing *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), and *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972)). For a discussion of integration as a goal of the Congress that passed Title VIII, *see* notes 49-54 and accompanying text *supra*.
182. 660 F. Supp. at 677.
183. 484 F.2d 1122 (2d Cir. 1973).
184. 660 F. Supp. at 678.
185. 840 F.2d 1096 (2d Cir. 1988).
186. *Id.* at 1101.
187. *Id.* at 1102-03.
188. *Id.* at 1101.
189. *Id.*
190. *Id.* at 1101-02.
191. *Id.* at 1102.
192. *Id.* at 1103.
193. *Id.* at 1106.

194. *Id.*
195. *Id.* at 1108
196. *Id.* at 1104.
197. *Id.* at 1105.
198. 57 LW 3075 (petition for *certiorari* in *Starrett City Associates v. United States* filed July 15, 1988).
199. *See* notes 207-209 and accompanying text *infra*. Numerous articles have also been written on this subject in recent years. *E.g.*, Kushner, "The Legality of Race-Conscious Access Quotas Under the Fair Housing Act of 1968," 9 *Cardozo L. Rev.* 1053 (1988); Smolla, "In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980s," 58 *Cal. L. Rev.* 947 (1985); Gelber, "Race-Conscious Approaches to Ending Segregation in Housing: Some Pitfalls on the Road to Integration," 37 *Rutgers L.Rev.* 921 (1985); U.S. Commission on Civil Rights, four papers on "Racial Occupancy Controls," in *Issues in Housing Discrimination*, Vol 1, at 145-207 (Nov. 12-13, 1985); Note, "Tipping the Scales of Justice: A Race-Conscious Remedy for Neighborhood Transition," 90 *Yale L.J.* 377 (1980); Note, "Benign Steering and Benign Quotas: The Validity of Race-Conscious Government Policies to Promote Residential Integration," 93 *Harv. L.Rev.* 938 (1980).
200. *See* notes 49-54 and accompanying text *supra*.
201. *E.g.*, *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *United States v. Paradise*, 107 S.Ct. 1053 (1987).
202. 484 F.2d at 1133.
203. 42 U.S.C. § 3608. For a discussion of some of the case law under this provision, see Part III-D *infra*.
204. 114 Cong. Rec. 2706 (1968) (remarks of Senator Javits). *See* notes 49-54 and accompanying text *supra*.
205. *E.g.*, *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937-38 (2d Cir. 1988); *see generally* Part II-C-3, *supra*.
206. *See, e.g.*, Lind, "Maintaining Residential Integration: Municipal Practices and Law," 31 *Clev. St. L. Rev.* 603, 629-45 (1982); Smolla, *supra* note 199, at 954-57.
207. This race-conscious loan program is described in Opinion No. 87-085 of Ohio Attorney General Anthony J. Celebrezze, Jr. (Dec. 14, 1987), which determined that the program did not violate any federal or state antidiscrimination laws.
208. 674 F. Supp. 1313 (N.D. Ill. 1987).
209. *See*, respectively, *Smith v. City of Cleveland Heights*, 760 F.2d 720 (6th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986), and *South Suburban Housing Center v. Greater South Suburban Board of Realtors*, 83 C 8149 (N.D. Ill.).
210. *See* note 59 and accompanying text *supra*.
211. *See, e.g.*, U.S. Department of Justice, 1986 Annual Report of the Attorney General of the United States, at 127-28.
212. 715 F.2d 315 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984).
213. CR No. 86-52 (E.D. Pa.), reported in U.S. Department of Justice, 1986 Annual Report of the Attorney General of the United States, at 127-28.
214. 42 U.S.C. § 3610.
215. 42 U.S.C. § 3608-§ 3609. The specific provision quoted in the text appears in § 3608(a).
216. 42 U.S.C. § 3608(e) (5).
217. *See generally* Part III-D-1 *infra*.
218. 42 U.S.C. § 3608(b).
219. *See, e.g.*, U.S. Department of Housing and Urban Development, 1987 Annual Report, at 21-23; 1986 Annual Report, at 25-27.
220. *See, e.g.*, U.S. Department of Housing and Urban Development, 1987 Annual Report, at 4-5; 1986 Annual Report, at 4-5.
221. These figures are taken from U.S. Department of Housing and Urban Development, 1979 Statistical Yearbook, at 43; 1981 Annual Report, at 12; 1982 Annual Report, at 36; 1983 Annual Report, at 51; 1985 Annual Report, at 27; 1986 Annual Report, at 26; and 1987 Annual Report, at 21.

222. U.S. Department of Housing and Urban Development, 1982 Annual Report, at 36.
223. *See*, U.S. Department of Housing and Urban Development, 1984 Annual Report, at 31-32.
224. U.S. Department of Housing and Urban Development, 1982 Annual Report, at 36; compare 1981 Report, at 12.
225. *See* note 59 and accompanying text *supra*.
226. *See* notes 18-23 and accompanying text *supra*.
227. U.S. Department of Housing and Urban Development, 1984 Annual Report, at 31.
228. U.S. Department of Housing and Urban Development, 1986 Annual Report, at 26; 1987 Annual Report at 21.
229. *See* § 810(a)(1)(A)(i) of the Fair Housing Act, as amended by The Fair Housing Amendments Act of 1988.
230. 42 U.S.C. § 3610(c).
231. U.S. Department of Housing and Urban Development, 1981 Annual Report, at 12.
232. U.S. Department of Housing and Urban Development, 1983 Annual Report, at 49.
233. *See P-H: Fair Housing--Fair Lending Report*, Bulletin for Aug. 1, 1988, at 4-5.
234. *See* U.S. Department of Housing and Urban Development, 1982 Annual Report, at 36.
235. *Id.*
236. U.S. Department of Housing and Urban Development, 1981 Annual Report, at 12; 1985 Annual Report, at 27; 1986 Annual Report, at 26; and 1987 Annual Report, at 21.
237. *See P-H: Fair Housing--Fair Lending Report*, Bulletin for May 1, 1986, at 2-3; *see also*, Citizens Civil Rights Research Committee, Fair Housing Complaint Processing Reconsidered Under the Virginia Fair Housing Law--A Public Interest and Individual Rights Perspective, reported in *P-H: Fair Housing--Fair Lending Report*, Bulletin for Oct. 1, 1986, at 4-5.
238. *See* § 810(f)(3)(A) of the Fair Housing Act, as amended by The Fair Housing Amendments Act of 1988.
239. *See id.* at § 812(g)(3).
240. *See id.* at § 810(f)(4).
241. *Id.* at § 810(f)(5).
242. 42 U.S.C. § 3610(a).
243. U.S. Department of Housing and Urban Development, 1982 Annual Report, at 36; 1983 Annual Report, at 51.
244. U.S. Department of Housing and Urban Development, 1985 Annual Report, at 27; 1986 Annual Report, at 26; and 1987 Annual Report, at 21.
245. *See*, U.S. Department of Housing and Urban Development, 1982 Annual Report, at 36.
246. *See*, U.S. Department of Housing and Urban Development, 1987 Annual Report, at 21; with respect to the accelerating damage awards in private cases, *see, e.g.*, Schwemm, Housing Discrimination Law Supplement, at 74-81 (1986).
247. *See* notes 20-21 and accompanying text *supra*.
248. *See generally*, § 810-§ 812 of the Fair Housing Act, as amended by The Fair Housing Amendments Act of 1988; notes 73-80 and accompanying text *supra*.
249. *See* 42 U.S.C. § 3608(a); notes 252-253 and accompanying text *infra*.
250. 401 U.S. 424 (1971).
251. *Id.* at 433-34.
252. 409 U.S. 205, 210 (1972).
253. *See* 24 CFR Part 109 (1988); *see* also 24 CFR Part 110 (HUD regulations concerning display of fair housing poster).
254. *See* Citizens' Commission on Civil Rights, A Decent Home: A Report on the Continuing Failure of the Federal Government to Provide Equal Housing Opportunity, at 55-56 (April 1983).
255. *See* Sec. 13(b) of the Fair Housing Amendments Act of 1988; *See also*, § 815 of the Fair Housing Act, as amended by The Fair Housing Amendments Act of 1988 (specifically authorizing HUD to make such rules).
256. 42 U.S.C. § 3608(e) (1)-(2).

257. *See* note 57 and accompanying text, *supra*.
258. Marans, Measuring Restrictive Rental Practices Affecting Families with Children: A National Survey (U.S. Department of Housing and Urban Development 1980).
259. *See* note 58 and accompanying text *supra*.
260. *See, e.g.*, U.S. House of Representatives, Committee on the Judiciary, Report 100-711: The Fair Housing Amendments Act of 1988, at 15 (accompanying n.10), and 19 (accompanying n.32), 100th Cong., 2d Sess. (June 17, 1988).
261. § 808(e) (2) (A) of the Fair Housing Act, as amended by the Fair Housing Amendments Act of 1988.
262. *See P-H: Fair Housing--Fair Lending Report*, Bulletin for June 1, 1988, at 6.
263. § 808(e)(6) of the Fair Housing Act, as amended by the Fair Housing Amendments Act of 1988.
264. *See* Citizens' Commission on Civil Rights, *supra* note 254, at 68-69.
265. 42 U.S.C. § 3609.
266. *See* U.S. Department of Housing and Urban Development, 1975 Annual Report, at 38. The text of this agreement is set forth at *P-H: Fair Housing--Fair Lending Report*, ¶ 19,901.
267. *See, e.g.*, U.S. Department of Housing and Urban Development, 1980 Annual Report, at 18.
268. *See, e.g.*, U.S. Department of Housing and Urban Development, 1981 Annual Report, at 13.
269. *See, e.g.*, U.S. Department of Housing and Urban Development, 1981 Annual Report, at 13; 1980 Annual Report, at 18.
270. *See, e.g.*, U.S. Department of Housing and Urban Development, 1982 Annual Report, at 37; 1983 Annual Report, at 51; 1985 Annual Report, at 28; 1986 Annual Report, at 27.
271. *See* U.S. Department of Housing and Urban Development, 1985 Annual Report, at 13; Citizens' Commission on Civil Rights, *supra* note 254, at 66-67.
272. *See* U.S. Department of Housing and Urban Development, 1985 Annual Report, at 28; 1986 Annual Report, at 27; 1987 Annual Report, at 22.
273. *See* 24 CFR § 120.25(b) (1988). These CHRB regulations were made final on May 12, 1982.
274. 455 U.S. 363 (1982).
275. *See, e.g.*, cases cited in note 29 *supra*.
276. *See* sources cited in notes 269 and 270 *supra*.
277. Pub.L. No. 100-242, 101 Stat. 1815 (1988).
278. *See P-H: Fair Housing--Fair Lending Report*, Bulletin for Feb. 1, 1988, at 2.
279. *See P-H: Fair Housing--Fair Lending Report*, Bulletin for July 1, 1986 at 1-3.
280. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74, 378-79 (1982).
281. *See P-H: Fair Housing--Fair Lending* Report, Bulletin for July 1, 1986, at p. 1; *id.*, Bulletin for Aug. 1, 1986, at 1.
282. *See* 53 Federal Register 25,576-83, proposing 24 CFR Part 125 (July 7, 1988).
283. 42 U.S.C. § 3608(d), (e) (5).
284. 347 U.S. 483 (1954).
285. Early examples of *Brown's* application to public housing cases include *Heyward v. Public Housing Administration*, 238 F.2d 689, 697-98 (5th Cir. 1956), and *Gautreaux v. Chicago Housing Authority*, 265 F. Supp. 582 (N.D. Ill. 1967), and 296 F. Supp. 907 (N.D. Ill. 1969).
286. 42 U.S.C. § 2000d *et seq.*
287. *See, e.g.*, *Clients' Council v. Pierce*, 711 F.2d 1406, 1425 (8th Cir. 1983) ("Congress enacted section 3608(e)(5) to cure the widespread problem of segregation in public housing"); *Young v. Pierce*, 628 F. Supp. 1037, 1056 (E.D. Tex. 1985), *order as to relief vacated in part*, 822 F.2d 1368 (5th Cir. 1987).
288. *See, e.g.*, cases cited in notes 289, 295, and 298 *infra*.
289. 436 F.2d 809 (3d Cir. 1970).
290. *See* Schwemm, *Housing Discrimination Law*, at 222-23 (1983).
291. *United States v. Yonkers Board of Education*, 624 F. Supp. 1276 (S.D. N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 2821 (1988).
292. 448 F.2d 731 (7th Cir. 1971).

293. The Due Process Clause of the Fifth Amendment contains an "equal protection component" that prohibits racial discrimination by federal officials. *E.g.*, *Washington v. Davis*, 426 U.S. 229, 239 (1976).

294. 711 F.2d 1406 (8th Cir. 1983).

295. 628 F. Supp. 1037 (E.D. Tex. 1985), *order as to relief vacated in part*, 822 F.2d 1368 (5th Cir. 1987).

296. 628 F. Supp. at 1054-57.

297. 737 F.2d 1530 (11th Cir. 1984).

298. 817 F.2d 149 (1st Cir. 1987).

299. *Id.* at 157.

300. *Id.* at 155.

301. *See* Kushner, *supra* note 41, at 352.

302. *See* Part II-C-4-b *supra*.

303. U.S. Department of Housing and Urban Development, 1987 Annual Report, at 21.

304. *Id.* at 22.

305. *See* Kushner, *supra* note 41, at 353-54.

306. *Id.* at 354 n.35.

307. *See P-H: Fair Housing--Fair Lending Report*, Bulletin for Oct. 1, 1988, at 4-5.

Chapter XVII: Appendix

1. In fact, congressional concern with the inadequacies in the enforcement mechanism under the 1968 Act can be traced back as far as the 92nd Congress, and legislation to address these problems was introduced in the 94th Congress.
2. Although there was always support for fair housing legislation like the FHAA among some Republicans, Senator Mathias was a leader on the issue as was Representative Fish. As a general matter, Republicans opposed this legislation and offered other proposals for addressing the acknowledged shortcomings in fair-housing enforcement.
3. The final day of subcommittee hearings which were conducted after the bill was reported were held to accommodate concerns raised by some about the constitutionality of the bill's administrative procedures, which were ultimately modified to alleviate this concern. *See* pp. xx-xx below.
4. The FHAA preserves the requirement that discrimination complaints from a state or other jurisdiction with a fair housing agency whose powers have been certified as being substantially equivalent to HUD's in terms of rights protected, procedures, and available remedies must be referred to that agency for resolution. *See* Section 810(f).
5. The one-year statute of limitations is a substantial increase over the previous 180-day period, but it is less than the two-year statute of limitations the FHAA provides for civil actions.
6. If the complaint concerns the legality of a state or local zoning or land use ordinance HUD is required to refer the matter to DoJ for appropriate action.
7. *See* Dissenting views of Messrs. Hyde, Sensenbrenner, Gekas, Dannemeyer, Swindall, and Slaughter, *House of Representatives Report 100-711*, at 95.
8. No hearing may be held or continued after the commencement of the trial in a civil action seeking relief for the discriminatory housing practice at issue in the hearing.
9. For purposes of imposing enhanced penalties, offenses committed by the same natural person are counted without regard to the time period that has elapsed between offenses.
10. In other attorney fees provisions, the FHAA provides that a person who prevails in a suit against them by the government, administrative or civil, can recover his fees under the standards of the Equal Access to Justice Act, 28 U.S.C. § 2412, if the government's position is not "substantially justified," and that an aggrieved person who intervenes in an administrative proceeding may recover attorney fees.
11. Exclusion of transvestites was the one hostile amendment to pass during the Senate's consideration of the FHAA.

Chapter XVIII

1. English Only proponents fall into two principal groups: U.S. English and English First. U.S. English was founded in 1983 by former Senator S.I. Hayakawa and John Tanton, head of the Federation for American Immigration Reform (FAIR). Linda Chavez, the President of U.S. English, recently resigned over a controversy surrounding a 1986 memo by Tanton which raised the specter of white Americans being overrun by minority groups. *Wash. Post*, Nov. 6, 1988.
   English First was founded in 1986 as a project of the Committee to Protect the Family and is now headed by Larry Pratt, a direct mail entrepreneur who directs Gun Owners of America, U.S. Border Control, and a growing family of New Right political action committees. Pratt is also Secretary of the Council for Inter-American Security, which published a report in 1985 linking bilingual education to an alleged threat of separatism and terrorism. *See* EPIC Events, Newsletter of the English Plus Information Clearinghouse, Mar./Apr. 1988, at 4.
2. There are currently sixteen official English language states: Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Kentucky, Mississippi, Nebraska, North Carolina, North Dakota, South Carolina, Tennessee, Virginia.
3. A Rand Corporation study, K. McCarthy & R. Burciaga Valdez, *Current and Future Effects of Mexican Immigration in California* (1986), found that persons of Mexican origin are making essentially the same progress of integration as earlier European immigrants. The study also examined the transition of Spanish speakers to English, finding the transition to English almost immediate. *See also* English Courses: Immigrants--a Rush to the Classrooms, *L.A.Times*, Sept. 24, 1986, at 1, col. 1 (reporting that in the L.A. Unified School District, officials estimate that 40,000 adults were turned away from English as a second language (ESL) classes in 1986).
4. Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 47 Yale L.J. 1419, 1432 (1988).
5. 29 C.F.R. § 1606.7(a) (1987). *See also* Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 Hous. L. Rev. 885, 894-898; Karst, *Paths to Belonging: The Constitution & Cultural Identity*, 64 N.C.L. Rev. 303, 351-57 (1986).
6. *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*,838 F.2d 1031, 1039 (9th Cir. 1988) (granting preliminary injunction against English-only workplace rule on grounds of national origin discrimination in violation of Title VII of Civil Rights Act).
7. Deutsch, *The Political Significance of Linguistic Conflicts in Les Etats Multilingues*, J. Savard and R. Vigneutt (eds.), Quebec: Leval (1975).
8. *See* Note, "*Official English*": *Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 Harv. L. Rev. 1345 (1987).
9. *Id.* at 1354.
10. U.S. Const., art. VI, cl. 2.
11. Benjamin Franklin wrote in 1753: "Why should Pennsylvania, founded by the English, become a colony of aliens, who will shortly be so numerous as to Germanize us instead of our Anglifying them?" *Quoted in The New Bilingualism: An American Dilemma* 31 (M. Ridge 1981).
12. *See* Heath, *Language and Politics in the United States*, in Linguistics and Anthropology 267, 270 (M. Saville-Troike ed. 1977).
13. *Id.*
14. *See* McFadden, *Bilingual Education and the Law*, 12 J.L. & Educ. 1, 7 (1983).
15. *See* Leibowicz, *The Proposed English Language Amendment: Shield or Sword?*, 3 Yale L. & Pol'y Rev. 519, 533 (1985).
16. *Id.* at 533-34.
17. J. Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925*, at 234-63 (1963).
18. C. Wittke, *German-Americans and the World War, Ohio State Archaeological & Historical Society*, at 163-89 (1936).
19. J. Higham, *supra* note 17, at 260.
20. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

21. 262 U.S. at 401.
22. Forbes & Lemos, *The History of American Language Policy, reprinted in* Staff of Committee on the Judiciary: House of Representatives and United States Senate, 97th Cong., 1st Sess., Final Report on U.S. Immigration Policy and the National Interest, Appendix A at 117, 118 (Comm. Print 1981).
23. J. Higham, *supra* note 17, at 249.
24. Leibowicz, *supra* note 15, at 538.
25. *See* Asian week, Apr. 15, 1986.
26. *Wash. Post*, Dec. 12, 1988, at All, col. 1.
27. *United States ex rel. Negron v. New York*, 434 F.2d 386, 391 (2d Cir. 1979).
28. 28 U.S.C. § 1827(d) (1982).
29. 42 U.S.C. § 2000e2 (1982).
30. *Lau v. Nichols*, 414 U.S. 563 (1974).
31. Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973 (1982).
32. *See* Leibowitz, *The Official Character of Language in the United States: Literacy Requirements for Immigration, Citizenship, and Entrance into American Life, reprinted in* Staff of Committees on the Judiciary: House of Representatives and United States Senate, 97th Cong., 1st Sess., Final Report on U.S. Immigration Policy and the National Interest Appendix A, at 432.
33. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).
34. *Id.* at 654.
35. *Puerto Rican Organization for Political Action v. Kusper*, 490 F.2d 575, 579 (7th Cir. 1973).
36. *Arroyo v. Tucker*, 372 F. Supp. 764, 767 (E.D.Pa. 1974).
37. S. Rep. No. 295, 94th Cong., 1st Sess. 28,*reprinted* in 1975 U.S. Code Cong. & Admin. News 774, 794.
38. 42 U.S.C. § 1973aa-la(b) (1982).
39. *See* S. Rep. No. 726, 90th Cong., 1st Sess. 49, *reprinted in* 1967 U.S. Code Cong. & Admin. News 2730, 2780.
40. 20 U.S.C. §§ 3221-3261 (1982).
41. *Lau v. Nichols*, 414 U.S. 563 (1974).
42. 42 U.S.C. § 2000d (1982). Title VI bans discrimination based "on the ground of race, color, or national origin" in "any program or activity receiving Federal financial assistance." The Court also relied on regulations promulgated by HEW that defined discrimination among students on account of race or national origin to include "discrimination ... in the availability or use of any academic...or other facilities of the grantee or other recipient." 45 C.F.R. 80.5(b).
43. Id. at 566.
44. 20 U.S.C. § 1703(f) (1982).
45. H.J. Res. 83 (Shumway), H.J. Res. 60 (Smith), H.J. Res. 83 (Miller), H.J. Res. 13 (Broomfield), H.J. Res. 656 (Shumway).
46. S.J. Res. 13 (Symms).
47. On May 11, 1988, the House Subcommittee on Civil and Constitutional Rights chaired by Rep. Don Edwards (D-CA) held a hearing on four proposed ELA resolutions. These resolutions were sponsored by Representatives Shumway (R-CA), Miller (R-OH), Broomfield (R-MI) and Smith (R-NE).
48. *See* Dale, Legal Analysis of S.J. Res. 167 Proposing an Amendment to the U.S. Constitution to Make English the Official Language of the United States, in The English language Amendment: Hearing on S. J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. (1984).
49. U.S. Const. art. 5.
50. *See* Negron, 434 F.2d 386.
51. The amendment is limited on its face to actions taken by the "United States" or "any State." The use of the word "ordinance," however, strongly suggests that the amendment would apply to municipalities as well.

52. *See* Guerra, *supra* note 4, at 1426. While the Constitution does not explicitly protect this right, the Supreme Court has repeatedly held that as a fundamental right, voting has a special place within the constitutional framework. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972).

53. *See, e.g., Serna v. Porales Municipal Schools*, 499 F.2d 1147 (10th Cir. 1974) (holding that school district violated Civil Rights Act of 1964 by not providing Spanish-surnamed students bilingual instruction to rectify their language deficiencies); *Rios v. Reed*, 480 F. Supp. 14 (E.D.N.Y. 1978) (holding that school district similarly violated Puerto Rican students statutory rights under Civil Rights Act of 1964, Civil Rights Act of 1871, Equal Educational Opportunities Act of 1974 and Bilingual Education Act of 1974).

Chapter XIX

1. 41 U.S.C. 554
2. 47 U.S.C.151 *et seq.*
3. 47 U.S.C. 309(a), 307.
4. *Nondiscrimination in Employment Practices of Broadcast Licensees*, 13 F.C.C.2d 766 (1968).
5. *Id.* at 769, citing *Television Corp. of Michigan v. FCC*, 244 F.2d 730-34 (CADC); *McIntire v. William Penn Broadcasting*, 151 F.2d 597 (CA3), *cert. denied*, 327 U.S. 779.
6. *Id.* at 770, citing *United Church of Christ v. FCC*, 359 F.2d 994, 1003 (CADC).
7. *Report of the National Advisory Commission on Civil Disorders* (New York: Bantam 1968). The Kerner Commission was formed by the President of the United States in order to conduct a systematic review of the impact of racial discrimination on the lives of minorities in this country.
8. *Nondiscrimination in Employment Practices of Broadcast Licensees*, 13 F.C.C.2d 766, 775 (1968).
9. *Id.* at 774.
10. *Id.*
11. *Id.* at 774-5.
12. *Id.* at 766. In 1967, the Office of Communication of the United Church of Christ and others petitioned the FCC to adopt EEO rules. The rule provided: no license shall be granted to any station which engages in discrimination in employment practices on the basis of race, color, religion, or national origin. Evidence of compliance with this section shall be furnished with each application for a license and annually during the term of each license upon prescribed forms.
13. *Id.* at 767-771 and Appendix A.
14. *Id.* at 771.
15. *Id.* at 772.
16. *Id.* at 775.
17. *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969).
18. *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 F.C.C.2d 430 (1970).
19. *Id.; see also Equal Employment Program*, 32 F.C.C.2d 708 (1971).
20. *Equal Employment Opportunity Inquiry*, 36 F.C.C.2d 515 (1972).
21. *Employment Policies and Practices--Florida*, 44 F.C.C.2d 735 (1974).
22. *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C.2d 226, 228 (1976). It is important to note that the Supreme Court has noted with approval the FCC's use of EEO requirements to promote diversity of programming: (t)hese regulations can be justified as necessary to enable the FCC to satisfy its obligation under the Federal Communications Act. . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. F.C.C.*, 425 U.S. 662, 670 n.7 (1976); *see also Office of the United Church of Christ v. F.C.C.*, 560 F.2d 529 (2nd Cir. 1977).
23. *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320 (1974); *Westinghouse Broadcasting Co., Inc.*, 48 F.C.C.2d 1123 (D.C. Cir., 1974).
24. *Stone v. FCC*, 466 F.2d 316, *reh. denied*, 466 F.2d 331 (D.C. Cir., 1972) (holding that about 29 percent of parity --7 percent black employment in an area with 24 percent black population --is within the zone of reasonableness).
25. F.C.C. Form 395, The Annual Employment Report. *See also, National Organization for Women v. F.C.C.*, 555 F2d 1002, 1018 (D.C. Cir., 1977); *Bilingual Bicultural Coalition v. F.C.C.*, 595 F2d 621, 645n.74 (D.C. Cir., 1978)
26. *FCC Public Notice No. 14932*, released March 10, 1977.
27. *FCC Public Notice No. 15528*, released February 13, 1980.
28. *National Black Media Coalition v. FCC*, 775 F.2d 342, 347 (1985).
29. *In re Application of Mission Central Company*, 54 F.C.C.2d 581, 586 (1975).

30. *Report and Statement of Policy re: Commission en banc Programming Inquiry* (1960 Programming Statement), 44 F.C.C. 2303, 2314 (1960).

31. *Television Hiring Practices 1980-1985: A Report on the Status of Minorities and Women*, by Edward Wachtel (United Church of Christ Office of Communication, 1986).

32. *Id.* at 5-7.

33. Petition for Rulemaking No. RM-3397 (filed June 13, 1979). *Memorandum Opinion and Order*, FCC 85-613 (released November 26, 1985); *see also* Petition for Reconsideration of RM-3397 (filed December 26, 1985).

34. *Rust Communications Group, Inc.*, 73 F.C.C.2d 39 (1979) *affirmed sub. nom. Metro-Act of Rochester, Inc. v. FCC*, 670 F.2d 202 (1981).

35. 47 U.S.C. 309(d)(1).

36. *See* Honig, "The FCC and Its Fluctuating Commitment to Minority Ownership of Broadcast Facilities," *Howard Law Journal*, Vol. 27, No. 3, at 864-868 (1983).

37. Statement of Dennis R. Patrick, Chairman, FCC, before House Subcommittee on Telecommunications and Finance, Attachment 1, at 4 (May 17, 1988).

38. 47 U.S.C. 309(e).

39. Statement of Dennis R. Patrick, Chairman, FCC, before House Subcommittee on Telecommunications and Finance, Attachment 1, at 2 (May 17, 1988); *see also* Honig, *The FCC and Broadcast EEO Enforcement: What Really Happened*, unpublished paper delivered at the Federal Communications Commission conference on Equal Employment in the Broadcast Industry; Washington, D.C., January 23, 1989, *citing*, Annual Reports of the FCC, 1979 and 1983.

40. *Id.*

41. Cable Communications Policy Act, Pub.L.No.98-549 (1984).

42. 47 U.S.C. 554.

43. Statement of Dennis R. Patrick, Chairman, FCC, to House Subcommittee on Telecommunications and Finance, Attachment 3, at 2 (May 17, 1988).

44. *Stone v. FCC*, 466 F.2d 316, 322 (D.C. Cir. 1972), citing 47 U.S.C. 309(d) and *West Michigan Telecasters Inc. v. FCC*, 396 F.2d 688, 691 (D.C. Cir. 1968).

45. 556 F.2d 59 (D.C. Cir. 1977)

46. *Id.* at 61.

47. *Id.* at 65.

48. 775 F.2d 342 (D.C. Cir. 1985)

49. *Id.* at 357.

50. *Id.* at 356 and n.17.

51. 854 F.2d 501 (D.C. Cir. 1988)

52. *Id.*

53. *Id.* at 503.

54. *Bilingual Bicultural Coalition of Mass Media, Inc. v. FCC*, 492 F.2d 656 (1974) (Court suggests in *dictum* that FCC should develop procedural tools to facilitate license renewal challengers since discrimination is a subtle process that leaves little evidence in its wake); *Bilingual Bicultural Coalition on Mass Media, etc. v. FCC*, 595 F.2d 621 (1978) (FCC abused its discretion in refusing either to grant challenger's request for discovery or conduct its own inquiry into reasons for employment disparities).

55. *Chinese for Affirmative Action v. FCC*, 595 F.2d 621, 636 (1978) (Spotswood W. Robinson, III dissenting) (FCC and court should not have rejected allegations of employment bias; FCC should not accept statistical disparities that give rise to an inference of purposeful racial bias).

56. *Nondiscrimination in Employment Practices* (Broadcast), 60 F.C.C. 2d 226, 260 (1976) (Commissioner James H. Quello concurring) (FCC should establish clear-cut procedures for processing complaints, develop a clear "zone of reasonableness" standard, increase capacity for investigating complaints and enforcing rules and policy); *Equal Employment Pennsylvania/ Delaware Renewals*, 36 F.C.C. 2d 515 (1972) (Commissioner Nicholas Johnson dissenting) (FCC should evolve higher EEO standards, enforce them more vigorously).

57. *Nondiscrimination in Employment Practices* (Broadcast), 60 F.C.C. 2d 226 (1976) (Commissioner Benjamin L. Hooks dissenting) (FCC should not raise exemption level for filing EEO information with FCC, should not retreat from commitment to civil rights, should not delude itself into complacency about employment discrimination.)

58. Statement of Dennis R. Patrick, Chairman, FCC, before the House Subcommittee on Telecommunications and Finance, at 13-14 (May 17, 1988).

59. See text discussion surrounding nn.27-31 *supra*.

60. 1987 FCC Employment Trend Report.

61. 595 F.2d 621, 645 n.74 (D.C. Cir. 1978)

62. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 980 (1978).

63. *Id.* at 981.

64. *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 52 R.R.2d 1301, 1306 (1982).

65. In its 1978 Policy statement, the Commission reaffirmed the important legitimate public interest objectives of ensuring diversification of programming and ownership in the following terms: it is apparent that there is a dearth of minority ownership in the broadcast industry. Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum, and of course, we have long been committed to the concept of diversity of control "because diversification.. . is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities." *Id.* at 981. *See also, Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C. Cir. 1975), citing support for the nexus between diversity of ownership and diversity of programming based on reasonable expectations, not advanced demonstration.
    This was a departure from the Commission's long established practice of prohibiting a licensee in a renewal or revocation hearing from disposing of its interest prior resolution of hearing issues. Before the distress sale policy was instituted, the only means of avoiding hearings prior to sales of broadcast properties was in the case where a licensee was bankrupt and innocent creditors were being protected, *e.g.*, *Larose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974); or when the licensee was physically or mentally disabled, *see*, 68 F.C.C.2d, *supra* at 983. *See generally*, Honig, *The FCC and its Fluctuating Commitment to Minority Ownership of Broadcast Facilities*, 27 How. L.J. 870 (1984).

66. *Clarification of Distress Sale Policy*, 44 R.R.2d 47 (1978). An exception was allowed for those licensees already in hearing status as of the May 1978 policy order. Such licensees could elect distress sale by November 1978 if: (a) no initial decision had been reached by the ALJ in the hearing; or (b) no competing applicant was involved in the hearing, thus eliminating the need for applying Ashbacker comparative hearing requirements to two or more mutually exclusive applicants. *Id.* at 480. *See generally*, Blue Ribbon Broadcasting, Inc., 76 F.C.C. 2d 429 (1980).

67. *See generally*, Hart, "The Case for Minority Broadcast Ownership," *Gannett Center Journal* 54, 57, 1988, which cites an excellent example of the distress sale policy working as was originally intended. Astroline Communications, a Hispanic-controlled company, purchased a distress sale station, WHCT-TV of Hartford, Connecticut, for $3.1 million.The station was purchased from owners previously sanctioned by the FCC for gross violations of agency regulations. The licensee was in the midst of protracted FCC hearings at the time of the sale. At that point, the station's facilities were dilapidated and its broadcast studio closed. After the purchase, Astroline put $15 million in new capital into the facility, upgraded its technical facilities, and added 40 new jobs. This sale resulted in new growth and competition in the local Hartford broadcast market. *See also*, Honig, *supra* n.65.

68. Honig, "*The FCC and its Fluctuating Commitment to Minority Ownership of Broadcast Facilities*," 27 *How. L.J.* 870 (1984). Before this policy, the only other means of avoiding hearings prior to sales of bradcast properties was in the case where a licensee was bankrupt and innocent creditors were being protected [*e.g.*, *Larose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974); or when the licensee was physically or mentally disabled. [*See*, 68 F.C.C. 2d, *supra* at 983.]

69. *See, Northland Television, Inc.*, 72 F.C.C.2d 51, 54-56 (1979).

70. 77 F.C.C.2d 156. 161-165 (1980).

71. *Id.* at 158 *See also, Blue Ribbon Broadcasting, Inc.*, 76 F.C.C.2d 429 (1980), in which a licensee who had commenced revocation hearing on alleged violations of the Communications Act and Commission regulations, was allowed to sell its station at 72% of assessed FMV. Despite the commencement of hearings in this case, the Commission granted a distress sale under the exceptions allowed for 1978 post-hearing cases. See earlier discussion of the FCC's 1978 *Clarification of Distress Sale Policy* at nn.68-69.
72. *Minority Ownership Lists*, FCC Consumer Assistance and Small Business Division (Jan.22, 1988).
73. *Id.*
74. *Id.*
75. Honig (1984) *supra*, n.65 and 68, at 859, 873. Since 1981, few stations have been designated for hearings, even for engineering or nonprogram related violations.
76. 56 R.R.2d 825, 827-828 (1984) [KROQ].
77. 61 R.R.2d 377 (Rev. Bd. 1986), *recon.denied, 61 R.R.2d 1033 (1986), review denied*, 63 R.R.2d 263 (1987) [SICC].
78. *Id.* at 1038-1039. In a March 31, 1989 case before the U.S. Court of Appeals for the District of Columbia, *Shurberg Broadcasting of Hartford, Inc. v. F.C.C.*, (No. 84-1600), a 2-1 vote of the sitting justices (Wald dissenting) ruled that the FCC's Minority distress sale program ("program") unconstitutionally deprived Alan Shurberg (a nonminority) and Shurberg Broadcasting (nonminority owned) of his equal protection rights under the Fifth Amendment because the program was not narrowly tailored (1) to remedy past discrimination or (2) to promote programming diversity. Specifically, the justices ruled that the distress sale program unduly burdened Shurberg, an innocent nonminority, ans was not reasonably related to interests it sought to vindicate. The case was remanded to the FCC for further action. This ruling provides another "red flag" of the urgent need for Congressional action in support of minority ownership policies.
79. 65 R.R.2d 192 (1988) [KHJ-TV].
80. RKO was disqualified as a licensee by the ALJ based on lack of candor, false financial reports, false billing, and misleading reports to the FCC regarding an IRS investigation.
81. See H.R. 1090 (101st. Cong., 1st Sess.), February, 1987, referred to the Committee on Energy and Commerce. *See also*, NABOB Petition for Rulemaking regarding Distress Sale Policies (1981) as cited in *Distress Sale Policy for Broadcast Licensees* (MM Docket No. 85-299), Notice of Inquiry (October 8, 1985).
82. Herter, "The Electromagnetic Spectrum: A Critical Natural Resource," 25 *Natural Resources Journal* 651 (1985).
83. *Id.*
84. Rossini, "Comment: The Spectrum Scarcity Doctrine: A Constitutional Anachronism," 39 *Southwestern Law Journal*, 827 (1985).
85. *Clear Channel Broadcasting in the AM Band*, 78 F.C.C.2d 1345, 1349 (1980). The Commission and courts have long recognized that these goals are contemplated by Section 307(b) of the Communications Act.
86. *Id.* at 1350.
87. *Id.*
88. *Id.* at 1347, 1364. Other needs cited were first or second local nighttime radio outlets, underserviced areas and additional public radio stations.
89. *Id.* at 1346.
90. *Id.* at 1368.
91. *See, Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). *See also, Garrett v. FCC*, 513 F.2d 1056 (1975).
92. 47 C.F.R. 73.37(e)
93. 78 F.C.C. 2d at 1369.
94. *Id.*
95. *Id.* Applications that proposed either first or second locally assigned radio service for an underserved community or a public-broadcasting service also received a preference.

96. *Deletion of AM Application Acceptance Criteria in § 3.37(e) of the Commission's Rules*, 59 R.R.2d 521, 522, 526 (1985). The Commission eliminated the minority preference because it also eliminated the first/second time service preference for underserved areas. The Commission contended that retention of the minority preference would have resulted in an exclusive "set-aside" effect which was not intended.
It should be noted that the Commission made these rule modifications concurrent with the discussion of benefits that would accrue to local day-time-only stations that could apply for the remaining AM spectrum space. Without the underservice or minority preference criteria as a hindrance, such applicants could utilize this spectrum to provide nighttime service in their daytime service area. Hence, this action principally served the interests of non-minority day-time only licensees (only 3 percent of day-time only licensees are minorities) whose previous opportunities for this spectrum had been restricted by the minority preference and first/second time service criteria.

97. *Id.* at 527.

98. *Id.* at 525.

99. *Id.* at 522, 526.

100. *Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels*, 3 F.C.C. Rcd. 3597 (June 8, 1988). These 14 frequencies represented AM clear channels in Canada, Mexico, and the Bahamas which were now available for nighttime service use in the U.S. Formerly, international agreements had excessively precluded nighttime operations on these channels. Eventually, in 1984, new international agreements were reached which allowed more flexible operational criteria on a non-interference basis. Thus, these new frequencies became available for nighttime service in the U.S.

101. *Id.* at 3598-3599.

102. 791 F.2d 1016 (2nd Cir. 1986).

103. *See* NBMC Petition for Reconsideration, MM Docket No. 84-281 at 1 (July 8, 1988).

104. Reply Comments of NBMC, MM Docket No. 84-281, at 1-4 (October 26, 1987).

105. John E. Oxendine and Kenneth O. Harris, "Financing Ownership of Broadcast Properties from a Minority Venture Capitalist Perspective," 12 *National Bar Association Law Journal* No. 1, 88 (1983).

106. At the time, NBMC was trying to get the Commission to provide investigation into these allegations by the Federal Trade Commission (the administrative body with jurisdiction over unfair trade practices).

107. *NBMC Letter to the FCC*, at 8-9, (February 12, 1986).

108. *Id.* at 9, n.5.

109. *Id.* at 10.

110. *Id.* at 10-11.

111. *See*, FTC letter to NBMC, at 4 (April 16, 1987).

112. Oxendine and Harris, at 90-98 (1983).

113. There are several venture capital companies that actively provide assistance to minority broadcast concerns (*e.g.*, Broadcast Capital Corporation, Synecom Capital Corporation, etc. . .). These companies have been involved in numerous aspects of the acquisition of broadcast properties by minority entrepreneurs, ranging from technical/managerial assistance to the development of funding support for acquisition opportunities. They are invaluable resources in the efforts to make ownership diversity a reality, and, therefore, should receive a wider variety of financial support from the Commission, the Small Business Administration, and the Department of Commerce. Such support could take the form of an annual 8(a) contract[s] awarded by the Commission to provide technical/managerial services at a subsidized rate for those minority applicants that request such services. *See*, Enhancement of Financing Alternatives Section herein for further discussion of venture capital assistance.

114. NBMC letter at 9 (February 12, 1986).

115. 47 C.F.R. 73.3555d(1) (1987).

116. *Id.*

117. Venture capital companies, both private and those licensed by the Small Business Administration (Section 301(d) SBIC's), have traditionally provided "gap" financing for minorities wishing to purchase telecommunications facilities. "Gap" financing is the difference between what conventional lenders (commercial banks or insurance companies) can supply as debt (usually about 50 percent of purchase price, or 3-5 times the current cashflows of the station to be acquired) and the equity provided by the minority entrepreneurs (usually about 10 percent of purchase price). As a result, SBIC's usually provide up to about 40 percent of equity or convertible debt funding to support a minority ownership acquisition. Section 301(d) SBIC (venture capital) companies have been involved in numerous aspects of the acquisition of broadcast properties by minority entrepreneurs, including (1) the purchase of equity interests, (2) the provision of long-term loan funds through convertible debt or warrants, (3) loan guarantees, and (4) management/technical assistance.

118. 89 F.C.C.2d 257, 260-261 (1982). In the FCC's lottery rulemaking proceedings common carrier licensees argued that diversity criteria did not apply to the nonbroadcast area. The FCC implemented random lotteries to distribute licenses as a means of avoiding the expense and delay of comparative licensing hearings. During the lottery rulemaking proceedings, the FCC resisted establishing minority preferences in the lottery despite a strong Congressional mandate to do so. After continued Congressional pressure, the FCC narrowly tailored the application of minority preferences in the lottery scheme. Arguably, this preference was narrowed to such an extent that it may have no effect in promoting minority ownership.

119. This assumes that the minority applicant would not violate multiple ownership rules for cross-service ownershiat

120. Superstation, (Satellite-cable transmission), Direct Broadcast Satellite, Pay-TV Cable Station, and the possible use of fiber optics for HDTV indicate the variety of nonbroadcast services currently available or possible. The Commission has applied the tax certificate policy to promote minority ownership of cable systems based upon the similarities between cable "programming services" and broadcast services. *See*, *Policy re: Minority Ownership of Cable Television Facilities*, 52 R.R.2d 1469, 1470 (1982).

121. All tax is deferred, provided that the seller reinvests in "qualified replacement property."

122. Assumes maximum tax rates, and does not take into account depreciation and investment tax credit recapture, which would affect the amount of tax due.

123. *Id.*

124. *Minority Ownership in Broadcasting*, 52 R.R. 2d 1301, n.1 (1982) [hereinafter *1982 Policy Statement*]. For the purposes of the tax certificate policy, the term "minority" includes blacks, Hispanics, American Indians, Alaskan Natives, Asians and Pacific Islanders.

125. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 2d 979, n.20 (1978) [hereinafter *1978 Policy Statement*]. Although the Commission noted that it would issue a tax certificate for the sale of a broadcast station or cable system to a corporation with less than 50 percent minority ownership if it is confident that working control resides in the minority shareholders (*id.*), it has apparently not done so. *See, e.g.*, Long-Pride Broadcasting Co., 48 R.R. 2d 1243 (1980).

126. *1982 Policy Statement, supra*, 52 R.R.2d at 1305-07.

127. *See* Tax certificate issued to KIXI, Inc. for the sale of KIXI(AM), Mercer Island, Washington and KIXI-FM, Seattle, Washington (May, 1986). Fifty-one percent of the voting stock of the corporate general partner was owned by minorities, and the corporate general partner owned 21 percent of the limited partnership's total equity.

128. Whether the seller is a minority company is irrelevant to the Commission's determination.It routinely issues tax certificates for sales of broadcast and cable properties from one minority company to another.

129. *William S. Green*, 59 F.C.C. 2d 78 (1976).

130. *J.A.W. Iglehart*, 38 F.C.C. 2d 541 (1972).

131. *See 1982 Policy Statement*, 52 R.R.2d at 1307-09.

132. Amendment of Section 73.3597, 99 F.C.C.2d 971, 974 (1985).

133. *1982 Policy Statement, supra.*, 52 R.R.2d at 1309 n.40.

134. 495 F.2d 929 (1973), *cert. denied*, 419 U.S. 986 (1974).

135. *Id.* at 938.
136. *Id.* at 936-38 (emphasis added). The Court relied *in part* on the FCC's policy of promoting maximum diffusion of control in order to maximize diversity of programming. *See generally, Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965)
137. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394-99 (1965); *West Michigan Broadcasting Company v. FCC*, 735 F.2d 601, 604-5 (1984), *cert. denied*, 470 U.S. 1027 (1985).
138. *Mid-Florida Television Corat*, 69 F.C.C.2d 607, 652 (1978), set aside on other grounds, 87 F.C.C.2d 203 (1981); *see also Gainesville Media, Inc.*, 70 F.C.C.2d 143 (1978).
139. *Id.* at 652.
140. 513 F.2d 1056 (D.C. Cir. 1975).
141. *Id.* at 1063, *citing TV 9*.
142. 735 F.2d 601, 613 (1984), *cert. denied*, 470 U.S. 1027 (1985). Specifically, the appellant argued that the FCC's use of a preference for minority applicants violated constitutional equal protection principles.
143. *Id.* at 612.
144. *Id.* at 613, citing *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980).
145. *Id.* at 613-14 (citations omitted).
146. Hart, "The Case for Minority Broadcast Ownership," *Gannett Center Journal*, at 54, 58 (Winter 1988).
147. *Id.* at 58.
148. 770 F.2d 1192 (1985), *vacated*, October 31, 1985, *remanded* October 9, 1986.
149. *Id.* at 1198.
150. *Id.*
151. *Id.* at 1196.
152. *Id.* at 1199 (parenthetical material added).
153. *Id.*
154. *Id.* at 1205 (parenthetical material added).
155. *Id.* at 1200.
156. *Id.* at 1208.
157. 52 Fed. Reg. 596 (1987).
158. House Joint Resolution 395, Pub. L. No. 100-202, enacted December 22, 1987; *see also* S. Re at No. 100-182, 100th Cong., 1st Sess. 76 (1987).
159. Brief for FCC, Docket Nos. 85-1755, 85-1756 (U.S. Ct. of Appeals, D.C. Circuit).
160. *Id.* at 43.
161. *Minority Broadcasting Station Ownership and Broadcast Programming: Is There a Nexus*, CRS Economics Division, Library of Congress (1988).
162. *Id.* at Summary.
163. Excellent statements of the argument include: the Wald dissent in *Steele v. FCC*, 770 F.2d 1192 (1985); Lieby, "The Female Merit Policy in *Steele v. FCC*: A Whim Leading to a Better World?," 37 *Am. U. Law Rev.* 379 (1988); Brief for FCC in *Winter Park Communications v. FCC*, Docket Nos. 85-1755, 85-1756 (U.S. Ct. of Appeals, D.C. Circuit); *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (1984); Comments of Syndicated Communications, Incorporated and Minority Broadcast Investment Corporation, before the FCC, *In The Matter of Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies*, June 11, 1987.
164. *Diversification in Broadcast Ownership Act of 1987*, S.1095, 100th Congress, 1st Session, at 1-2, introducted April 24, 1987; *Diversity in Media Ownership Act of 1987*, H.R. 1090, 100th Congress, 1st Session, at 3, introduced February 11, 1987.

Chapter XX

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1. Article I, section 2, clause 3 of the Constitution provides: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers. . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."

   Article I, Section 2 was amended by the Fourteenth Amendment, section 2 to read: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed." With the abolition of slavery in the aftermath of the Civil War, this provision of the Fourteenth Amendment thus eliminated Article I, Section 2's reference to "free persons" and "other persons" (*i.e.*, slaves, who were counted as three-fifths of a person for the purposes of apportionment and direct taxation under the original Constitutional language).
2. The Constitution does not explicitly command the use of census data for intrastate congressional districting and courts are divided on the question of whether use of census data is required by the Constitution.*See* Note, "Constitutional Implications of a Population Undercount", 69 Geo. L.J. 1427, 1431 n.41 and cases cited therein.
3. For a complete list of federal programs that use the decennial census as the basis for computing allocation formulas (as of March 1987) see GAO, Grant Formulas, GAO/HRD-87-28. The constitutional issues concerning the allocation of federal funds differ to some extent from those concerning apportionment because they are based on equal protection, rather than on the census clause. For a discussion of these equal protection arguments, see Note, "Demography and Distrust", 94 *Harv. L. Rev.* 841, 861-863 (1981).
4. For the use of census data in the enforcement of civil rights laws, see Congressional Research Service, "Improving Census Accuracy", prepared for the Subcommittee on Census and Population of House Committee on Post Office and Civil Service (the "Census Subcommittee"), Committee Print 100-6 (October 12, 1987) (hereinafter *CRS Report)* at 24. For an example of the use of census data in a Title VII case, see *Rivera v. City of Wichita Falls*, 665 F.2d 531 (5th Cir. 1982); for the use of census data in jury selection, see *U.S. v. Biaggi*, 680 F. Supp. 641 (S.D. N.Y. 1988).
5. For the use of census data by private industry, see CRS Report at 25-26.
6. An example of public planners' use of census data can be seen in the testimony of Peter Groat, Department of City Planning, San Francisco, CA in the August 17th Hearing of the Census Subcommittee, Census Undercount and the Feasibility of Adjusting Census Figures, Serial No. 100-23 [hereinafter Rpt. 100-23].
7. Although the doctrine is most commonly known as "one person, one vote" the term is misleading for several reasons. First, the weight of a vote will vary from state-to-state because the Constitution gives each state at least one member of the House of Representatives, regardless of the population of the state. Second, as the Supreme Court has held in the landmark cases of *Wesberry v. Sanders*, 376 U.S 1 (1981) and *Reynolds v. Sims*, 377 U.S. 553 (1981), the equality required by the Constitution is based on population, not on numbers of eligible or registered voters. Thus, the more accurate characterization of the principle is "equal representation for equal numbers of people." *See Wesberry* at 7; *Reynolds* at 560.
8. *See FAIR v. Klutznick*, 486 F. Supp 564, 570 n.10 (D.D.C., 3 judge court), *app. dis. 447 U.S. 916 (1980).*
9. *See Karcher v. Dagett*, 462 U.S. 725 (1983) (New Jersey districts with population variation of 1 percent are unconstitutional.)
10. Quoted in CRS Report, at 97 n.142.

11. In recent years, there have been a number of bills introduced in Congress to require adjustment of the Census. *See CRS Report, Appendix 2*. Legislation was introduced in the 100th Congress to require the Department of Commerce to adjust the census for the undercount, H.R. 3511, but the Congress ended without any action on the bill. A similar bill has recently been introduced by Congressman Dymally in the 101st Congress. H.R. 526.
12. For a more detailed discussion of the Census Bureau's position and the Commerce Department decision, see below.
13. At least one lawsuit has already been filed, *City of New York v. United States Department of Commerce*, 88 Civ. (E.D. N.Y). A number of other cities and urban areas have joined the lawsuit, including Los Angeles, Chicago, and Dade County. At the time of writing, there has been no action on the complaint by the court.
14. CRS Report at 3, Table 1.
15. *Id.* The differential rose to 5.8 percent in 1950, but by 1980 it was back to 5.2 percent.
16. *Id.* at 40.
17. Census Subcommittee, "Problems of Undercount in the 1990 Census", Serial No. 100-19 (July 14, 1987) [hereinafter Rpt. 100-19] at 2.
18. *E.g.*, the undercount in Los Angeles is estimated at 9 percent. *See* Census Subcommittee, "The Decennial Census Improvement Act", Serial No. 100-51 (March 3, 1988) [hereinafter Rpt. 100-51] at 109; the urban Hispanic undercount is approximately 10.3 percent. See Rpt. 100-23 at 17.
19. *E.g.*, one study suggests that the "coverage of the Hispanic population in the 1970 census [is] intermediate between the coverage of whites and the coverage of blacks." Siegal, Jacob S. and Jeffrey S. Passel, *Coverage of the Hispanic Population in the 1970 Census*, cited in CRS Report at 5. Other evidence suggests that the undercount rate for Hispanics was similar to that for blacks. *See* Erickson, Eugene [hereinafter Erickson], *Adjusting the 1980 Census* (July 1987), reprinted in Rpt. 100-23 at 92.
20. For Asian-Pacific-Americans, see testimony of Joseph Kadane, Rpt. 100-23 at 44.
21. CRS Report at 6. Cities are doubly disadvantaged: not only do they contain more minorities, but minorities are harder to count in cities than elsewhere. *See* Erickson, *supra* note 19, Rpt. 100-23 at 92. One study suggests that in New York City, the population was undercounted by 400,000 in 1980, while the rest of the state was overcounted by 150,000. *See* CRS Report at 42.
22. According to the Census Bureau, half of all households believe that other government agencies have access to census data, notwithstanding the Bureau's repeated assurances of confidentiality. *See* Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction, *City of New York v Dept. of Commerce*, *supra*, at 10.
23. For some vivid examples of housing or residence patterns that were missed in the 1980 census, see testimony of Patricia Becker, Planning Department, Detroit, MI., Rpt. 100-23 at 68-69. For the problems of counting migrant workers, see Rpt. 100-23 at 19-21.
24. The mailing of census forms began in 1960; mail-out, mail- back, in 1970. *See* CRS Report at 44-48.
25. *See* testimony of Patricia Becker, Rpt. 100-23 at 68-69.
26. *See* testimony of Barbara Bailar, former Associate Director of the Census Bureau, Rpt. 100-51 at 123: "The census will have an undercount in 1990, and it will be larger than in 1980."
27. Some have argued that the Constitution bars the counting of undocumented persons, but that argument was rejected in connection with the 1980 census. *See FAIR v. Klutznick, supra*, 486 F. Supp. at 576. See also *Plyler v. Doe* 457 U.S. 202, 210 (1982). The Census Bureau includes undocumented aliens in its count (the Bureau estimates that it counted about two million people who were not legally resident in 1980; *see* CRS Report at 102), and in 1980 the Bureau successfully persuaded the INS to institute a moratorium on INS enforcement activities during the Census to help improve the likelihood that undocumented persons would agree to participate. It is unclear whether there will be a similar moratorium in 1990.
28. *See* CRS Report at 46.

29. *See* Testimony of Barbara Bailar, Rpt 100-51 at 104-108. A table assessing the cost per person of various coverage improvement programs appears in CRS Report at 49 (Table 2). It shows that cost per person ranged from $.55 for the Whole Household Usual Home Elsewhere check to over $75 for the Non-Household Sources check (using records from other agencies). Coverage improvement efforts cost $300 million in the 1980 census. Subsequent analysis suggests that many aspects of this program were not cost effective. In general, pre-census activities were more cost-effective than post-census activities (*see* CRS Report at 47).

30. Some of the coverage improvement programs produced duplication rather than greater accuracy. The net result may have been to produce an overall total count that is closer to the actual population, but which conceals even greater differentials. The Census Bureau usually characterizes the final result of the 1980 census as a 1.4 percent undercount. But this includes 2.7 million duplicates (or "raw" overcount). Subtracting these duplicates, the raw undercount was 2.6 percent. (*See* testimony of Barbara Bailar, Rpt. 100-51 at 81).

Some of the techniques used by the Bureau, that lead to overcount, tend to favor those who are already well-covered in the census. *For example*, one Census Bureau expert estimates that two-thirds of the units added by the technique known as "vacant-delete" check were duplicates, and over 80 percent of those added by this technique were in the suburbs. Another procedure used to count households who were in vacation or temporary homes during the census added 214,000 duplicates, and the evidence suggests that these, too, were disproportionately outside the inner cities. The result of using these procedures is to exacerbate the differential undercount. Rpt. 100-51 at 106 (statement of Barbara Bailar). By contrast, blacks' share of additions from the process of imputation is larger than their share of the population as a whole. Thus imputation does reduce the differential undercount slightly. CRS Report at 55 and table.

31. Report of John G. Keane 1 (June 2, 1987) quoted in Plaintiffs' Memorandum of Law, *supra*, at 11.

32. Fifty-two lawsuits were filed in the aftermath of the 1980 census alleging undercount. Thirty-one suits were consolidated in the District of Maryland, pursuant to an order of the Judicial Panel on Multi-District Litigation.*See In re 1980 Decennial Census Adjustment Litigation*, 506 F. Supp. 648 (J.P.M.D.L. 1981). Several of the more important cases proceeded on their own.

One such suit, brought by the City and State of New York, originally resulted in order requiring an adjustment. *Carey v. Klutznick*, 508 F. Supp. 420 (S.D. N.Y. 1980). The court there held that there had been an undercount in New York City and statewide, that there were statistical techniques available to produce a more accurate census count, and where such techniques are available, the Constitution requires adjustment. *Id.* at 433. The Second Circuit reversed, 653 F. 2d 732 (2d Cir. 1981), *cert. den.* 455 U.S. 999 (1982) on procedural grounds (including the court's failure to involve other states that might be affected by an adjustment) and sent the case back to the trial court. On remand, the district court upheld the Census Bureau, finding, as the Bureau had argued, that adjustment was not technically feasible, and that the Bureau's decision not to adjust was not arbitrary or capricious. *Cuomo v. Baldridge*, 674 F. Supp. 1089 (S.D.N.Y. 1987).

In a second case, involving Detroit, the district court held that the Census clause of the Constitution required an accurate count, and that where there is a substantial undercount involving blacks and Hispanics, adjustment is required. *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich 1980). The Sixth Circuit reversed on procedural grounds (standing and ripeness) 652 F.2d 617 (6th Cir. 1981), *cert. den.* 455 U.S. 939 (1982). Finally, in *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980) the court denied the government's motion to dismiss, holding the Constitution and Census Act permit adjustment.

33. For a description of the Bureau's research program, see testimony of Barbara Bailar, Rpt. 100-51 at. 89-100.

34. The Census Bureau receives advice from a number of outside advisory Committees. They include the Panel on Decennial Census Methodology of the Committee on National Statistics of the National Academy of Sciences [hereinafter NAS panel], the Census Advisory Committee of the American Statistical Association [hereinafter ASA panel] and the standing Census Advisory Committee on Population Statistics.

35. Both the NAS panel and the ASA panel concluded that adjustment was technically feasible. (*See* statement of Benjamin King, chair of NAS panel, Rpt. 100-19 at 42: "The results of this research and the evidence found in the 1986 Test of Adjustment Related Operations that census adjustment is technically feasible lead us reaffirm our earlier recommendation that work proceed at the Bureau on the development of adjustment procedures.")

The Census Bureau's Undercount Steering Committee reached the same conclusion in May 1987. *See* testimony of Barbara Bailar, Rpt. 100-51 at 110: "[T]he written conclusions from the meeting made the following points: On Technical Feasibility: Virtually everyone agrees that using the PES estimates to reduce the differential undercount is feasible. If standards are met, we could adjust." Some statistics experts disagreed with this conclusion.*See, e.g.*, Testimony of Thomas Hofeller, Rpt.100-19 at 80; statement of David Freedman, Rpt. 100-23 at 26.

36. The dual estimation system involves comparing two independent samples, then, using the statistical technique of capture-recapture, estimating the number missed by the original census survey. The Census Bureau planned to generate the second sample through a Post Enumeration Survey (PES) of 300,000 housing units following the census itself. This technique was used in the Census Bureau's 1986 Test of Adjustment Related Operations (TARO) and formed the basis for the conclusion that an adjustment of the 1990 Census was technically feasible.
There are a number of technical issues concerning the accuracy and reliability of using the capture-recapture technique in conjunction with the PES. For a detailed defense of the reliability of this approach, see testimony of Barbara Bailar, Rpt. 100-51 at 90-100; for a criticism, see statement of David Freedman, Rpt. 100-23 at 30-34.

37. Most of those involved were uncertain about "operational feasibility"--the ability to apply the techniques in practice to a national census in a timely way. But most (including all the outside advisory groups) agreed that planning should go forward with a 300,000 person PES to permit a decision on adjustment to be made based on a real trial of the technique. The Census Bureau recommended to the Secretary of Commerce that a final decision on adjustment should only be made after completion of the PES, so that the quality of the data could be judged. *See* statement of Barbara Bailar, Rpt. 100-51 at 111. *See also*, *id.* at 49. The NAS panel appeared to believe that an adjustment could be made by December 31, 1990 (*see* Rpt 100-19 at 33). The Advisory Committee on Population Statistics recommended that no effort be made to adjust by the December 31, 1990 *(id.* at 15).

38. The Census Bureau's decision to go forward with procedures that would permit adjustment was made in late May, 1987, and that decision was communicated to senior officials in the Commerce Department on June 2, 1987. "In 1990, the Census Bureau expects to be able to use estimation to decrease the systematic error in the census resulting from the differential undercount." Rpt. 100-51 at 112. *See also*, Plaintiffs memorandum of law, *supra*, at 23.

39. The Department's decision was contained in a press release issued by the Under Secretary for Economic Affairs on October 30, 1987. *See* Rpt. 100-51 at 2, 8-10. Some in the Department have alleged that the decision was made by August, 1987, but concealed from the Census Bureau staff, Congress and the public. *See id.* at 129. Plaintiffs Memorandum of Law, *supra*, at 26. "The budget 'should give a clear signal that we do not intend to adjust the results of the 1990 census.'" (Quoting an August 7, 1987 memorandum from Commerce Deputy Secretary Clarence Brown to Under Secretary Ortner.)
In the wake of Commerce's decision, the Bureau's Associate Director for Statistical Standards and Methodology, Dr. Barbara Bailar, resigned from the Bureau, where she had worked for twenty-nine years. Shortly thereafter, Dr. Kirk Wolter, Chief of the Bureau's Statistical Research Division, also resigned. In commenting on the circumstances that led to her resignation, Dr. Bailar stated: "The Census Bureau had turned into a place quite unlike the great place I had worked for over twenty-nine years. There was constant intrigue, closed doors, orders to cancel meetings with reporters, orders to cancel meetings with outside groups, orders even to expunge the word 'adjustment' from minutes of advisory committee meetings, and a general air of secrecy. Memos critical to the 1990 census were deliberately withheld from Bureau staff." Rpt. 100-51 at 117.

40. Among the improvements planned for 1990 are expanded out-reach, promotion and publicity (including the use of minority-run advertising firms), increased private sector involvement, enhanced local review, mail reminders to precede the census questionnaires, and additional automation.*See* testimony of John Keane, Rpt. 100-51 at 26-30.

41. These explanations are drawn both from Ortner's press release and his testimony before Congress in March 1988, Rpt. 100-51 at 1-14.

42. *See* letter from Donald Rubin (Chairman of the Harvard University Statistics Department), Vincent Barabba (Director of the Census Bureau during the 1980 census and President-elect of the ASA), and others to Congressman Mervyn Dymally: "We strongly urge the restoration of the original plan for deciding whether to adjust the 1990 census for undercount, and if so, for deciding how it should be done. . . . To return to this plan requires first and foremost the restoration of the 300,000 household sample for the PES--without this, experts agree that statistically sound adjustment, even if ordered by the courts, would be extremely difficult."
43. Plaintiffs in the New York case also argue that the Commerce Department violated its own procedures by intervening in a decision that had been delegated to the Census Bureau. Plaintiffs Memorandum of Law, at 41-44.
44. 13 U.S.C., § 141(a).
45. 13 U.S.C., § 195.
46. 13 U.S.C., § 141 (b) and (c).
47. *See Carey v. Klutznick, supra*, 508 F.Supp. at 433; *Young v. Klutznick, supra* 497 F. Supp. at 1331-33. Both lower court decisions were reversed on procedural grounds on appeal. *See supra*, note 32.
48. *See, e.g.*, Durbin, Thomas M, "A Constitutional and Legal Analysis of Adjustments of a Decennial Census by the Use of Sampling and Other Statistical Methods," (Congressional Research Service, January 15, 1987, CRS RPT. 87-54a) at 5: "Relying on the *Wesberry* rationale, it would seem that any procedure or method employed by the Bureau of the Census, including statistical adjustments which would make the census count more accurate, would be constitutionally justified since it is the accuracy of the census and not necessarily the method of its count which is of primary constitutional importance." A similar conclusion is reached in Note, "Constitutional Implications" *supra*, at 1446; Jennis, "The Census Undercount: Issues of Adjustment" 18 Colum. J.L. & Soc. Probs. 381, 390 (1984).
49. For a review of the history of the Census clause, see Note, "Constitutional Implications", *supra*, at 1442-1446. The language "actual enumeration" appears for the first time in the final draft of the Committee on Style. *See id.* at 1445 n.101. For a history of the relevant language of the 14th Amendment, see *id.* at 1450-52.
50. Rpt 100-19 at 65. It is important to understand that the census is not a "register" of the population.Thus, to use an example from the CRS Report, consider two individuals, Smith and Jones, who would fill out the census questionnaire identically. A census which counted Jones twice and missed Smith would still be accurate; a register which included Smith twice and omitted Jones would not.
51. *Id. at 55.*
52. Rpt 100-19 at 28.
53. CRS Report at 45
54. In Carey, *supra*, 508 F. Supp at 414-5 and Young, *supra*, 497 F. Supp. at 1327-28, 1333, 1338-9, the district courts suggested that adjustment was required the Constitution; in City of Philadelphia, *supra*, the court viewed adjustment as constitutionally permissible but not necessarily required.
55. For the legislative history of the Census Act (and in particular section 195), see Note, "Constitutional Implications" *supra* at 145-59 and Durbin, *supra* at 13-14).
56. *See Young*, *supra*, 497 F. Supp. at 1334-5 (adjustment permitted as supplement to traditional methods under section 195); accord, *Carey*, *supra*, 508 F. Supp. at 415. *Durbin*, *supra*, takes this view; *contra*, Note, "Constitutional Implications" *supra*, at 1458-63 (Congress intended to bar adjustment through section 195 because it believed that adjustment was prohibited by the Census clause, but such a bar on adjustment is unconstitutional).
57. Thus, the Department argues that its decision should be reviewed under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et. seq*. In the 1980 litigation the government argued that the form of the census and the decision to adjust are activities that are committed to agency discretion by law, (*see* 5 U.S.C. § 701 (a) (2)), and thus not subject to review. *See Carey*, *supra*, 508 F. Supp at 413; *Young*, *supra*, 497 F. Supp. at 1335. But this position was rejected by the courts. *See Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (affirming district court order requiring the Census Bureau to compare its master address registers with a computerized register of New York city residents eligible for Medicaid).

Instead, courts have reviewed the Bureau's adjustment decision under 5 U.S.C. § 706 (a) (2) (whether the agency decision was "arbitrary, capricious, an abuse of discretion or not in accordance with law"). *See City of Philadelphia, supra*, 503 F. Supp at 675-76. *Accord, Cuomo, supra*, 674 F. Supp at 1105 ("strong policy considerations dictate a narrow standard of review . . . the determination of whether the use of currently available adjustment techniques will provide a more or less reliable estimate of the population than the unadjusted census is an extraordinarily technical one. . . . The Bureau, which has the necessary experience, expertise and resources is better equipped to decide whether, in view of this dispute among experts, the census should be adjusted."); *also Carey, supra*, 508 F. Supp. at 430.

In *Young* the district court also indicated that the Bureau's decision should be reviewed under 5 U.S.C. § 706 (a) (2), but suggested that heightened scrutiny might be called for: "[T]his does not mean that, when statutory and Constitutional rights of the magnitude involved here are present, the Court is tied to the narrow type of review appropriate for the decisions of an administrative agency." 497 F. Supp. at 1336. On the scope of review generally, *see* Jennis, *supra* at 401-10.

58. *See Cuomo, supra*.

59. To the extent that the courts relied on the Bureau's expertise, see. *id.* at 1105, the fact that the Bureau felt that adjustment was technically feasible for 1990 and was prepared to go forward with procedures that might permit adjustment could lead the courts to reach a different decision on adjusting the 1990 census, than in 1980 when the Bureau itself concluded that adjustment was not feasible. In 1980, the Bureau decided not to adjust only after it had analyzed the data from the 1980 Post Enumeration Program.

60. *See Carey, supra*, 637 F. 2d at 838.

61. As originally enacted in 1957, 13 U.S.C. § 195 provided: "Except for the determination of population for apportionment purposes, *the Secretary may, where he deems it appropriate*, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." (emphasis added). The 1976 amendment substituted "the Secretary shall, if he considers it feasible" for the highlighted language in the 1957 version. *See Durbin, supra* at 13-14. This suggests a somewhat stronger Congressional predisposition in favor of statistical adjustment in non-apportionment cases. In addition, the absence of the strict statutory deadlines in non-apportionment uses of census data (such as allocating federal funds) should facilitate the use of statistical adjustment.

Chapter XXI

1. The author is grateful for the assistance of Lani Guinier, Associate Professor, University of Pennsylvania Law School, whose insightful comments and suggestions have contributed greatly to this paper, to Laughlin McDonald, Director of the Southern Regional Office of the American Civil Liberties Union, for his helpful comments, and to Emily Epstein of the Lawyers' Committee for Civil Rights Under Law for research assistance in completing this paper.
2. John Hatchett, "Reynolds didn't back vote bias cases," *USA Today*, October 17, 1983.
3. For critiques of voting rights enforcement under prior administrations, see Howard Ball, Dale Krane, and Thomas P. Lauth, *Compromised Compliance: Implementation of the 1965 Voting Rights Act* (Westport, Conn.: Greenwood Press, 1982), and Steven F. Lawson, *In Pursuit of Power: Southern Blacks and Electoral Politics, 1965-1982* (New York: Columbia University Press, 1985).
4. 42 U.S.C. § 1973 et seq.
5. *See* the congressional committee reports in support of the extension of the Voting Rights Act in 1982, H.R. Rep. No. 97-227, 97th Cong., 1st Sess. (1981); S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 177; United States Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* (Washington: Government Printing Office, 1981); Frank R. Parker and Barbara Y. Phillips, *Voting in Mississippi: A Right Still Denied* (Washington: Lawyers' Committee for Civil Rights Under Law, 1981); Laughlin McDonald, *Voting Rights in the South* (Atlanta: American Civil Liberties Union, 1982); Rolando L. Rios and Gladys A. Alonzo, *A Survey of Chicano Representation in 361 Texas Public School Boards 1979/80* (San Antonio: Southwest Voter Registration Education Project, 1981).
6. *Id.*
7. *Allen v. State Board of Elections*, 393 U.S. 544, 566 (1969).
8. Joint Center for Political Studies, *Black Elected Officials: A National Roster* 1 (Washington: Joint Center for Political Studies, 1988).
9. Citizens' Commission on Civil Rights and National Center for Policy Alternatives, *Barriers to Registration and Voting: An Agenda for Reform* 4-12 (Washington: 1988); *see also*, Frances Fox Piven and Richard A. Cloward, *Why Americans Don't Vote* (New York: Pantheon Books, 1988).
10. *Barriers to Registration and Voting*, at 53-115.
11. *Id.*, at 8-11.
12. 674 F. Supp. 1245, 1252-56 (N.D. Miss. 1987).
13. Voting Rights Act Amendments of 1982, 96 Stat. 131, *codified at* 42 U.S.C. § 973
14. *See Thornburg v. Gingles*, 478 U.S. 30 (1986); *United States v. Dallas County Commission*, 739 F.2d 1529 (11th Cir. 1984); *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984).
15. 42 U.S.C. § 1973.
16. 42 U.S.C. § 1973c. The Section 5 requirement of federal preclearance of all voting law changes currently applies to: Alabama, Alaska, Arizona, California (four counties), Michigan (parts of two counties), Mississippi, New Hampshire (parts of seven counties), New York (Manhattan, Brooklyn, and the Bronx), North Carolina (40 counties), South Carolina, South Dakota (two counties), Texas, Virginia, and Arizona (12 counties). *See* Department of Justice, *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, As Amended*, 28 C.F.R. Part 51, Appendix (1988).
17. For an analysis of the various provisions of the Voting Rights Act written for lay readers, see United States Commission on Civil Rights, *A Citizens' Guide to Understanding the Voting Rights Act* (Washington: Government Printing Office, 1984).
18. 446 U.S. 55 (1980).
19. *See White v. Regester*, 412 U.S. 755, 765-70 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

20. On the limitations of the discriminatory intent standard, see S. Rep. No. 97-417, 97th Cong., 2d Sess. 36-37 (1982); Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va. L. Rev. 715, 740-46 (1983)
21. *See* Parker, *The "Results" Test of Section 2 of the Voting Rights Act*, 69 Va. L. Rev. at 736-37.
22. *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 66-199 (testimony of Attorney General William French Smith), 1655-1707 (testimony of Assistant Attorney General William Bradford Reynolds) (1982).
23. Smith testimony, *supra* note 22, at 71.
24. The House-passed bill and the principal Senate bill both stated: "*Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."
25. U.S. Department of Justice, Voting Section, Civil Rights Division, "Voting Cases at District Court Level in Which the United States' Participation Began After January 20, 1981," 1 (January 1, 1989).
26. U.S. Department of Justice, *Civil Rights Division: Enforcing the Law*, VII. Voting, at 2.
27. "Voting Cases at District Court Level," at 1-7.
28. *Id.*, at 1-3.
29. *United States v. Mississippi* (S.D. Miss. filed July 9, 1987).
30. *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F Supp. 1245 (N.D. Miss. 1987).
31. These examples are taken from Frank R. Parker and Barbara Y. Phillips, "Justice Department Voting Rights Enforcement: Political Interference and Retreats" (January 20, 1982).
32. "Justice Department Withdraws Support in Edgefield Case," Columbia, S.C., *State*, September 14, 1981.
33. Johanna Newman, "Cochran-Lott, one-two punch attack stirs controversy in federal agencies," Jackson, Mississippi, *Clarion-Ledger*, July 22, 1981.
34. UPI, "Justice Department Revises Language in Ala. Suit Papers," *Washington Post*, May 16, 1981.
35. Leadership Conference on Civil Rights, *Without Justice: A Report on the Conduct of the Justice Department in Civil Rights in 1981-82* (Washington: Leadership Conference on Civil Rights, 1982) at 65.
36. S. Rep. No. 97-417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 206-07.
37. 478 U.S. 30 (1986).
38. *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984) (three-judge court), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles, supra* note 37.
39. Brief for the United States as Amicus Curiae, at 8 n.12, 24 n.49 *Thornburg v. Gingles, supra* note 37.
40. *Thornburg v. Gingles, supra* note 37, 478 U.S. at 43 n.7.
41. *Thornburg*, 478 U.S. at 61-62, Brief for the United States as Amicus Curiae, at 28-32. For an analysis showing that this position is inconsistent with the congressional intent in amending Section 2, see Richard L. Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 Howard L. J. 495 (1985).
42. *Thornburg*, 478 U.S. at 74-75; Brief for the United States as Amicus Curiae, at 21-28.
43. *See Ketchum v. Byrne*, 740 F.2d 1398, 1413-71 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985); Frank R. Parker, "Racial Gerrymandering and Legislative Reapportionment," at 108-11, ch. 5 in Chandler Davidson, ed., *Minority Vote Dilution* (Washington: Howard University Press, 1984).
44. *Jordan v. Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court), *vac'd and remanded*, 461 U.S. 921 (1983), *on remand*, 604 F. Supp. 807 (N.D. Miss. 1984), *aff'd mem. sub nom. Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1084).
45. Brief for the United States as Amicus Curiae, at 12, *Brooks v. Winter*, 461 U.S. 921 (1983).
46. 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).
47. *Id.* at 1413.
48. *Id.* at 1419.

49. Brief for the United States as Amicus Curiae, at 9, 13, *City Council of City of Chicago v. Ketchum*, 471 U.S. 1135 (1985).
50. *James v. City of Sarasota, Florida*, 611 F. Supp. 25, 32-33 (M.D. Fla. 1985).
51. 649 F. Supp. 289 (M.D. Ala. 1986), *aff'd in part and remanded in part*, 831 F.2d 246 (11th Cir. 1987).
52. Brief for the United States as Amicus Curiae, at 7-11, *Dillard v. Crenshaw County*, 831 F.2d 246 (11th Cir. 1987).
53. *Id.* at 252.
54. *Allen v. State Board of Elections*, 393 U.S. 544 (1969).
55. David H. Hunter, *Federal Review of Voting Changes* 9 (Washington: Joint Center for Political Studies, 2d ed. 1975).
56. U.S. Department of Justice, Civil Rights Division, Voting Section, "Number of Changes to Which Objections Have Been Interposed by Type and Year, 1965 December 31, 1987."
57. *Id.*
58. U.S. Department of Justice, Civil Rights Division, "Complete Listing of Objections Pursuant to Section 5 of the Voting Rights Act of 1965" (April 30, 1988).
59. U.S. Department of Justice, Civil Rights Division, Voting Section, "Number of Changes to Which Objections Have Been Interposed by State and Year, 1965 December 31, 1987."
60. 574 F. Supp. 325 (E.D. La. 1983) (three-judge court).
61. 590 F. Supp. 345 (E.D.N.C. 1984) (three-judge court), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles, supra* note 37.
62. 565 F. Supp. 1473 (M.D. Ala. 1983).
63. Civil No. B-83-342-CA (E.D. Tex. August 14, 1984).
64. *Nomination of William Bradford Reynolds to be Associate Attorney General of the United States: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 448 (1985).
65. United States Commission on Civil Rights, *Political Participation* 42-43 (Washington: Government Printing Office, 1968).
66. Section 5 objection letter from Assistant Attorney General Jerris Leonard to Mississippi Attorney General A.F. Summer, May 21, 1969.
67. Section 5 preclearance letter from Reynolds to Mississippi Attorney General Edwin Lloyd Pittman, August 29, 1986.
68. *See* Parker and Phillips, *Voting in Mississippi*, at 72-79, 81-82.
69. Section 5 preclearance letter from Reynolds to Mississippi Attorney General Edwin Lloyd Pittman, January 2, 1987.
70. *Horry County v. United States*, 449 F. Supp. 990 (D.D.C. 1978) (three-judge court).
71. 603 F. Supp. 174 (N.D. Ala. 1985) (three-judge court).
72. 509 F. Supp. 1334 (D.S.C. 1981) (three-judge court), *rev'd*, 454 U.S. 393 (1982).
73. *Haskins v. County of Wilson*, Civil No. 82-19-Civ-8 (E.D. N.C. August 16, 1985).
74. Section 5 preclearance letter from Reynolds to Z. Hardy Rose, attorney for the Wilson County Board of Education, July 11, 1986.
75. *United States v. Wilson County Board of Education* (E.D. N.C. filed August 22, 1986).
76. Section 5 preclearance letter from Reynolds to George A. Monk, attorney for the City of Anniston, December 12, 1983.
77. Section 5 preclearance letter from Reynolds to James M. Holly, attorney for the City of Aiken, May 26, 1987.
78. Section 5 preclearance letter from Reynolds to Paul H. Dunbar, III, attorney for the City of Augusta, January 2, 1987.
79. *United States v. City of Augusta* (S.D. Ga. filed January 8, 1987); *United States v. City of Aiken* (D.S.C. filed November 24, 1987).
80. 383 U.S. 301, 328 (1966).
81. *Id.*

82. Congress's intent was expressed in the report of the Senate Judiciary Committee, S. Rep. No. 97-417, 97th Cong., 2d Sess. 12 n.31 (1982), and by sponsors of the bill during the floor debates, 128 Cong. Record S7095 (daily ed. June 16, 1982) (remarks of Sen. Kennedy); 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner and concurrence by Rep. Edwards).
83. *Beer v. United States*, 425 U.S. 130, 141 (1976).
84. *See Lockhart v. United States*, 460 U.S. 125 (1983).
85. Post-Trial Brief for the United States, *County Council of Sumter County, South Carolina v. United States*, Civil No. 82-0912 (D.D.C.).
86. Letter from Reynolds to Senator Orrin G. Hatch, September 21, 1983.
87. *Nomination of William Bradford Reynolds to Be Associate Attorney General of the United States: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 118-19 (1985) (Reynolds testimony).
88. Department of Justice, *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965; Proposed Rules*, 50 Fed. Reg. 19,131 (to be codified at 28 C.F.R. § 1.56(c)) (proposed May 6, 1985).
89. *See* Lawson, *In Pursuit of Power* ch. 6.
90. Transcript, at 6.
91. Howard Kurtz, "Justice Dept. Won't Assess Possible Bias in Election Plans," *Washington Post*, August 30, 1986, at A1.
92. 28 C.F.R. § 1.55(b).
93. *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985).
94. 28 C.F.R. § 1.54(b)(4).
95. 28 C.F.R. § 1.18(c).
96. *South Carolina v. Katzenbach*, 383 U.S. 301. 308 (1966).
97. *Allen v. State Board of Elections*, 393 U.S. at 567.
98. *Chisom v. Roemer*, 853 F.2d 1186 (5th Cir. 1988); *Clark v. Roemer*, No. 88-3626 (5th Cir. September 7, 1988).

Chapter XXII

1. H. R. Rep. No. 897, 96th Cong., 2d Sess. 8 (1980) (conference report) [hereinafter "House Conference Report"].
2. For recent examples of persistent harmful and inappropriate institutional conditions, *see, e.g., Lelsz v. Kavanagh*, 675 F. Supp. 828 (N.D. Tex. 1987) (opinion holding defendants in contempt for violation of consent decree and finding serious violations in the areas of habilitation, medical care, staffing, use of aversive conditioning and abuse and neglect of residents, among others); Care of Institutionalized Mentally Disabled Persons: Joint Hearings Before the Subcomm. on the Handicapped of the Sen. Comm. on Labor and Human Resources and the Subcomm. on Labor, Health and Human Services, Education and Related Agencies of the Sen. Comm. on Appropriations, 99th Cong., 1st Sess., Parts 1 and 2 (1985) [hereinafter referred to as "1985 Weicker Hearings"] (numerous witnesses testifying about deleterious institutional conditions in Texas and New Jersey institutions, among others--Part 1--and staff of Senate Subcommittee on the Handicapped reporting on observations of substandard conditions in various institutions--Part 2).
3. 42 U.S.C. § 1997 et seq.
4. 457 U.S. 307 (1982).
5. As the Senate Judiciary Committee wrote in 1979: "The inescapable conclusion is that in the foreseeable future, institutionalized individuals will continue to depend on the U.S. Justice Department as the primary enforcer of their constitutional and Federal Statutory rights." S. Rep. No. 416, 96th Cong., 1st Sess. 19 n.54 (1979).
6. 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373 (M.D. Ala. 1972) (treatment standards for mental hospitals), 344 F. Supp. 387 (M.D. Ala. 1972) (habilitation standards for mental retardation institutions), *aff'd in relevant part, reserved in part sub nom. Wyatt v. Aderholt*, 503 F. 2d 1305 (5th Cir. 1974). Also in 1971, President Nixon issued a statement on mental retardation calling on the Justice Department to "strengthen the assurance of full legal rights for the retarded." President's Statement on Mental Retardation, 7 Weekly Comp. of Pres. Doc. 1530 (Nov. 16, 1971).

   This section relies heavily on Dinerstein, *The Absence of Justice*, 63 Neb. L. Rev. 680 (1984) [hereinafter "Dinerstein"].
7. 344 F. Supp. 373, 379-386 (mental health standards); 344 F.Supp. 387, 395-407 (mental retardation standards).
8. 344 F. Supp. at 375, n.3.
9. According to the House Conference Report on CRIPA, the Justice Department participated as *amicus curiae* or plaintiff-intervenor in more than 25 prison and mental health cases between 1971 and 1980. House Conference Report, *supra* note 1, at 8.
10. *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D. N.Y. 1973), *New York State Ass'n for Retarded Children v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975)(approving consent decree)(subsequent history omitted).
11. *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part and rev'd in part*, 612 F. 2d 84 (3d Cir. 1979), *rev'd and remanded*, 451 U.S. 1 (1981)("Pennhurst I"), *judgment reinstated on state law grounds*, 673 F. 2d 647 (3d Cir. 1982)(en banc), *rev'd and remanded*, 465 U.S. 89 (1984) ("Pennhurst II").
12. The Special Litigation Section was created in 1978, with the merger of the Office of Special Litigation, established in 1974 to handle mental disability cases, and the Office of Public Accommodations and Public Facilities, which handled, *inter alia*, prison and jail cases. The Office of Special Litigation was created to protect the "Constitutional rights of children and mentally [and] physically handicapped persons of all ages." *1975 Annual Report of the Attorney General* 85, *quoted in*, The Washington Council of Lawyers, *Reagan Civil Rights: The First Twenty Months* 85 (1982) [hereinafter referred to as "Washington Council of Lawyers Report"].
13. The institutions were the Rosewood State Hospital in Owings Mills, Maryland and the Boulder River Hospital in Montana. Both institutions housed mentally retarded individuals.

14. *United States v. Solomon*, 419 F. Supp. 358 (D. Md. 1976), *aff'd*, 563 F. 2d 1121 (4th Cir. 1977) (Rosewood State Hospital); *United States v. Mattson*, C.A. No. 74-138-BU (D. Mont. Sept. 29, 1976), *aff'd*, 600 F. 2d 1295 (9th Cir. 1979)(Boulder River Hospital).

15. *See*, Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary, 95th Cong., 1st Sess. 29 and n.5 (1977) (discussing cases in which defendants sought to dismiss United States as plaintiff-intervenor on the basis of a lack of "standing").

16. *See id.*; Civil Rights of Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977); Civil Rights of the Institutionalized: Hearings on S. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) [hereinafter "1979 Senate Hearings"]; Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979).

17. Pub. L. No. 96-247, 94 Stat. 349, codified at 42 U.S.C. § 1997.

18. 42 U.S.C. § 1997a.

19. 42 U.S.C. § 1997b.

20. *See* 126 Cong. Rec. 3713 (1980) (remarks of Senator Bayh, the principal sponsor of CRIPA).

21. S. Rep. No. 416, 96th Cong., 1st Sess. 27 (1979). *See* also, 1979 Senate Hearings, *supra* note 16, at 23, in which the following colloquy occurred between Senator Simpson and then-Assistant Attorney General Drew S. Days III:
"Senator Simpson: . . . It seems to me that in your testimony, and what I am listening to and my background review of last year's action, that the key to the bill is really litigation. Am I correct about that?
Mr. Days: That's correct."

22. The CRIPA legislative history is replete with references to the cases brought by the Justice Department and others that sought to ensure that institutional residents be placed in those settings that were least restrictive of individual liberty. *See, e.g.*, S. Rep. No. 416, 96th Cong., 1st Sess. 2 (1979); House Conference Report, *supra* note 1, at 9. *See generally*, Motion for Leave to Intervene and to File a Complaint in Intervention filed in *United States v. Massachusetts*, C.A. No. 85-0632-MA (June 29, 1986), at 8-11 (discussing legislative history supportive of community placement relief).

23. 457 U.S. 307 (1982).

24. 457 U.S. at 315. Under the circumstances, it seems clear that the Court would have embraced these rights as constitutional minima in the absence of the state's concession. Lower court cases subsequent to *Youngberg* have not attempted to draw any distinctions between the conceded rights and those specifically found by the Court.

25. Although *Youngberg* was a case brought on behalf of one mentally retarded individual, later cases have made it clear that courts have applied its analysis to the rights of institutionalized mentally ill individuals as well. Moreover, although the result was not foreordained, later cases have not limited *Youngberg* to damage actions but have followed it in cases seeking injunctive relief. *See, e.g., Ass'n for Retarded Citizens of North Dakota v. Olson*, 561 F. Supp. 473, 487-88 (D. N.D. 1982), *aff'd*, 713 F. 2d 1384 (8th Cir. 1983)(concluding that *Youngberg*'s language counseling deference to professionals was not limited to damage actions, despite Court's explicit concerns with imposing financial liability on state professionals ultimately not responsible for lack of funding and other causes of institutional harm).

26. *See*, *Youngberg v. Romeo*, 457 U.S. at 321-23.

27. *Id.*, at 325-27 (Blackmun, J., concurring). In making this argument, Justice Blackmun was relying on a right-to-treatment theory first articulated in *Jackson v. Indiana*, 406 U.S. 715 (1972), where the Court said, in another context, "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the person is committed." *Id.*, at 738. The *Jackson* theory was essentially the same theory adumbrated by Judge Johnson in *Wyatt v. Stickney*, discussed *supra*. According to the *Jackson* analysis, if the state *promised* its institutionalized citizens treatment (a promise reflected, for example, in its statutory scheme) then it had to deliver treatment or else run afoul of due process concerns.

28. *See*, *Youngberg v. Romeo*, 457 U.S. at 328.

29. *Id.*, at 329 (Burger, C.J., concurring in the judgment).

30. Dinerstein, *supra* note 6, at 694.

31. The memorandum is discussed in Dinerstein, *supra* note 6, at 694; Note, *The Constitutional Right to Treatment in Light of Youngberg v. Romeo*, 72 Geo. L. J. 1785, 1786 and n.6 (1984); Washington Council of Lawyers Report, *supra* note 12, at 100-101; and 7 Ment. Dis. L. R. 5-8 (Jan.-Feb. 1983). The memorandum was excerpted in the latter reporter, and was leaked to the *Washington Post*, which ran a story on the controversy. *Wash. Post*, Sept. 29, 1982, at A2, col. 1.

32. *See*, 7 Ment. Dis. L. R. at 6.

33. *Id.*, at 8.

34. Department of Justice, Civil Rights Division, *Correcting the Record of Civil Rights Enforcement January 20, 1981 to September 30, 1982: A Response to the Report of the Washington Council of Lawyers* 49 (November 1982) [hereinafter referred to as "Civil Rights Division Response"].

35. Remarks of the Hon. Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Before the American Bar Association Commission on the Mentally Disabled (November 5, 1982).

36. C. A. No. 3195-N (M.D. Ala.). *Wyatt v. Ireland* is the case name for the later proceedings in the original Wyatt v. Stickney litigation discussed previously.

37. Nos. 78-1490, 78-1564 and 78-1602 (3d Cir.). For prior history of the *Pennhurst* case, see note 11, *supra*.

38. *Wyatt v. Ireland*, C.A. No. 3195-N, Orders of October 25, 1979 and January 15, 1980.

39. *See, Wyatt v. Ireland*, C. A. No. 3195-N at 8 n.3 (M.D. Ala. Feb. 1, 1983). By 1982, Judge Johnson had been appointed to the United States Court of Appeals for the Eleventh Circuit and Judge Myron Thompson had replaced him on the *Wyatt* case.

40. *Id.*, Proposed Settlement Agreement, at 3.

41. For a criticism of JCAH and Medicaid standards and the mechanisms for enforcing compliance with them, *see* 1985 Weicker Hearings, *supra* note 2, at 335-36 and *id.*, Part 2, Appendix: Staff Report on the Institutionalized Mentally Disabled [hereinafter referred to as "1985 Weicker Staff Report"], 83-134; *cf. Woe v. Cuomo*, 729 F. 2d 96, 106 (2d Cir.), *cert. denied*, 469 U.S. 936 (1984) (compliance with JCAH standards merely demonstrates prima facie evidence of adequate care).

42. Wyatt v. Ireland, C.A. No. 3195-N (M.D. Ala. September 22, 1986) (order approving consent decree). The court approved the proposed consent decree despite opposition to it, *see* Stevens, *Wyatt v. Stickney Concludes With a Whimper*, 11 Ment. & Phys. Dis. L. R. 139-40 (March-April 1987), and its own misgivings about the decree. *See* Order of September 22, 1986 at 11, 12 (characterizing proposed decree as a "mixed bag" and noting that lawsuit reflected "a long trail of broken promises" by defendants). In addition to maintaining the court orders intact, the consent decree called for defendants to continue their efforts to place institutional residents in community-based facilities. The five-person expert panel appointed by the court to advise defendants apparently has experienced some frustrations in its efforts to facilitate compliance with the consent decree. Personal communication from plaintiffs' attorney to the author.

43. Reynolds, "Power to the People", *N.Y. Times*, September 13, 1987 (Magazine), at 117-18.

44. Johnson, *Observation: The Constitution and the Federal District Judge*, 54 Tex. L. Rev. 903, 914-15 (1976), *quoting* McCormack, *The Expansion of Federal Question Jurisdiction and the Prisoner Complaint Caseload*, 1975 Wis. L. Rev. 523, 536 (footnotes in both sources omitted).

45. The passage of time has not softened the observations of the Court of Appeals for the Fifth Circuit on institutional harm at the Partlow State School, one of the facilities addressed in the *Wyatt* litigation:

> The patients suffered brutality, both at the hands of the aides and at the hands of their fellow patients; testimony established that four Partlow residents died due to understaffing, lack of supervision, and brutality.
>
> One of the four died after a garden hose had been inserted into his rectum for five minutes by a working patient who was cleaning him; one died when a fellow patient hosed him with scalding water; another died when soapy water was forced into his mouth; and a fourth died from a self-administered overdose of drugs which had been inadequately secured.

Wyatt v. Aderholt, 503 F. 2d 1305, 1311, n.6 (5th Cir. 1974), *aff'g*, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972). Moreover, an examination of the history of the litigation shows that the district court gave defendants numerous opportunities both before and after the entry of its detailed orders to propose and implement a meaningful plan designed to address the serious harm that they admitted existed in the institutions. *See, e.g.*, *Wyatt v. Stickney*, 334 F. Supp. 1341, 1344 n.3 (M.D. Ala. 1971) (rejecting defendants' proposed standards), 325 F. Supp. 781, 785-86 (M.D. Ala. 1971) (giving defendants 90 days to prepare and file plan).

46. *Wyatt* was not the only example, however. *See, e.g.*, American Civil Liberties Union, *In Contempt of Congress and the Courts: The Reagan Civil Rights Record* 3 (February 27, 1984) (discussing Department's opposition to proposed settlement agreed to by plaintiffs and defendants in *Gary W. v. Louisiana*, C.A. No. 74-2412 "C" (E.D. La.)) *and* Enforcement of Section 504 of the Rehabilitation Act: Institutional Care and Services for Retarded Citizens: Hearing Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. 187 (testimony of Stephen A. Whinston), 199 (prepared statement of Stephen A. Whinston) (1983) [hereinafter referred to as "1983 Enforcement Hearing"] (describing Department of Justice's role in *Connecticut Ass'n for Retarded Citizens v. Thorne*, C.A. No. H-78-653 (D.Conn.), wherein the Department entered negotiations concerning a proposed settlement with defendants but without plaintiffs. Subsequently, the Department rejected the proposal because the state's offer was "too generous" and included language, proposed by the state, establishing the appropriate level of training for residents and a timetable for community placement of some of them). *See also*, 1985 Weicker Hearings, *supra* note 2, at 366-67 (colloquy between Senator Weicker and Yvonne Olenick) (after Reagan Administration came into office, Connecticut Association for Retarded Citizens "lost a good ally" in the *Thorne* case).

47. In relevant part, the procedural history of the *Pennhurst* case was as follows: 446 F.Supp. 1295 (E.D. Pa. 1977) (ordering substantial injunctive relief, including the closure of the Pennhurst institution, based on constitutional, federal statutory and state statutory grounds), *aff'd in part and rev'd in part*, 612 F.2d 84 (3d Cir. 1979) (basing decision primarily on Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6010, and concluding that under that statute Pennhurst might be the least restrictive environment for at least some of its residents), *rev'd and remanded*, 451 U.S. 1 (1981)(concluding that DD Act Bill of Rights language relied on by Court of Appeals was merely precatory), *judgment reinstated on state law grounds*, 673 F.2d 647 (3d Cir. 1982)(en banc), *rev'd and remanded*, 465 U.S. 89 (1984)(holding that Eleventh Amendment prevented a federal court from ordering injunctive relief against state officials based on violation of state law), *on remand*, Nos. 78-1490, 78-1564 and 78-1602 (3d Cir., pending after remand from Supreme Court).

48. Fourth Brief for the United States, *Halderman v. Pennhurst State School and Hospital*, 465 U.S. 89 (1984) (3d Cir. 1984, Nos. 78-1490, 78-1564 and 78-1602, pending after remand from the Supreme Court), at 7-8, *quoted in*, Dinerstein, *supra*, note 6, at 699. The Chief Justice's "concurrence" in *Youngberg* was reminiscent of his concurrence in *O'Connor v. Donaldson*, 422 U.S. 563, 578 (1975) (Burger, C.J., concurring), in which he argued forcefully against recognition of any right to treatment for institutionalized persons, while joining in the narrow liberty-based decision issued by the majority. The history of the Burger concurrence in *Donaldson* is told more fully in B. Woodward and C. Bernstein, *The Brethren: Inside the Supreme Court*, 369-83 (1979).

49. In so arguing, the Department made use of a very misleading quotation to support its position. *Compare* the Department's *Pennhurst* brief at 9, n.3, in which it cited *New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 971 n.19 (2d Cir. 1983), one of the later opinions in the Willowbrook case, for the proposition that "placement in small community facilities is not appropriate for all mentally retarded persons," *with* the language in the Willowbrook decision itself where what the court actually said was, "In this connection, we note that *defendants are by no means alone in contending that* placement in small community facilities is not appropriate for all mentally retarded persons." (Emphasis added).

50. *See* the Department's *Pennhurst* brief at 12 (rejecting right-to-treatment theory based on *Jackson v. Indiana*, again following Chief Justice Burger's lead), 15-16 (rejecting Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, as a basis for supporting community-based treatment).

51. The plaintiffs and defendants agreed to settle the *Pennhurst* case on July 12, 1984, and thereafter the district court entered an order approving the settlement. *Halderman v. Pennhurst State School and Hospital*, 610 F. Supp. 1221 (E.D. Pa. 1985). The settlement called, *inter alia*, for the closure of Pennhurst by July 1, 1986. The facility is now closed.

52. President's Committee on Mental Retardation, *Resolution Concerning the Rights of Mentally Retarded Citizens and the Necessary Supporting Role of the U.S. Dep't of Justice* (1984) (criticizing Department's reversal of "at least fourteen years of bipartisan support" for residents' rights to habilitation). *See also*, Association for Retarded Citizens of the United States, News Release of April 27, 1984 ("We are shocked at the action of the Justice Department. . . . This is an absolute flip-flop of justice and a poor message to the world that says: '[T]oday people have rights that we might change our minds tomorrow.'").

53. *See generally*, the hearings cited in Note 16, *supra*.

54. *See, e.g.*, Remarks of the Hon. Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Before the American Bar Association Commission on the Mentally Disabled 7-8 (November 5, 1982).

55. *See, e.g.*, *Ass'n for Retarded Citizens v. Olson*, 561 F. Supp. 473, 485-89 (D. N.D. 1982), *aff'd* 713 F. 2d 1384 (8th Cir. 1983). Even post-*Youngberg* cases that have read the case narrowly have adopted the Blackmun concurrence. *See, e.g.*, *Society for Good Will to Retarded Children v. Cuomo*, 737 F. 2d 1239, 1250 (2d Cir. 1984) (adopting Blackmun concurrence despite rejecting least restrictive alternative analysis); *cf. Lelsz v. Kavanagh*, 807 F. 2d 1243, 1251 (5th Cir. 1987) (suggesting that *Youngberg* "may eventually have to be squared with the duty of a state to prevent deterioration of skills of the retarded committed to its institutions"). *See*, *Clark v. Cohen*, 794 F. 2d 79, 87, 96 (Becker, J., concurring) (endorsing Blackmun concurrence, noting other courts' acceptance of it, and endorsing extension of the principle of non-deterioration to address level of skills that person would have attained but for institutionalization).

56. *See*, *Youngberg v. Romeo*, 457 U.S. at 319, n.25.

57. Courts that have rejected a right to treatment in the least restrictive setting after *Youngberg* include *Lelsz v. Kavanagh*, 807 F. 2d 1243, 1251 (5th Cir. 1987), and *Society for Good Will to Retarded Children v. Cuomo*, 737 F. 2d 1239, 1249 (2d Cir. 1984). On the other hand, *Clark v. Cohen*, 794 F. 2d 79 (3d Cir.) (en banc), *cert. denied*, 479 U.S. 962 (1986), and *Thomas S. v. Morrow*, 781 F. 2d 367 (4th Cir.), *cert. denied sub nom. Kirk v. Thomas S.*, 476 U.S. 1124 (1986), and *cert. denied sub nom. Childress v. Thomas S.*, 107 S. Ct. 235 (1986), have determined that where professional judgment unanimously agrees that institutionalization is inappropriate, community placement can be required under *Youngberg*'s reasoning. *See also*, *Ass'n for Retarded Citizens v. Olson, 561 F. Supp. 573, 486 (D. N.D. 1982) (Youngberg* "suggests" rejection of least restrictive means reasoning, but institutional residents nevertheless have a right to the least restrictive method of training where professional judgment concludes it would "measurably enhance" their enjoyment of basic liberty interests), *aff'd on other grounds*, 713 F. 2d 1384 (8th Cir. 1983). A measure of the confusion on the continued viability of least restrictive reasoning after *Youngberg* is suggested by the multiplicity of opinions in *Rennie v. Klein*, 720 F. 2d 266, 269 (3d Cir. 1983) (Opinion of Garth, Aldisert, and Hunter, J.J.) (*Youngberg* precludes least restrictive means analysis in instant case); *id.*, at 271 (Opinion of Adams, J., concurring in the result) (Supreme Court rejected least restrictive intrusive means test); *id.*, at 274 (Weis, J., dissenting) (*Youngberg* Court found least intrusive means test not relevant in the case, but did not reject it). For a recent analysis of the state of the law in this area, see Costello and Preis, *Beyond Least Restrictive Alternative: A Constitutional Right to Treatment for Mentally Disabled Persons in the Community*, 20 Loyola of Los Angeles L. R. 1527 (1987) [hereinafter referred to as "Costello and Preis"].

58. 457 U.S. 291 (1982). *Mills* presented the issue of whether involuntarily-committed mentally ill individuals had a constitutional right to refuse treatment (specifically, psychotropic medication). For criticism of the Department's failure to file *amicus curiae* briefs in *Youngberg* and *Mills*, *see* Washington Council of Lawyers Report, *supra* note 12, at 95-96. Without indicating why briefs were not filed in these cases, the Civil Rights Division responded to the criticism by noting that many factors go into the decision not to file *amicus curiae* briefs. Civil Rights Division Response, *supra* note 34, at 48.

59. 473 U.S. 432 (1985).

60. *See, e.g.*, N. Rosenberg, "Activism without Equality," 133-35, in *The Burger Years: Rights and Wrongs in the Supreme Court, 1969-1986* (H. Schwartz ed. 1987); Note, *We Have Met the Imbeciles and They Are Us: The Courts and Citizens with Mental Retardation*, 65 Neb. L. Rev. 768 (1986).
61. Brief for the United States As Amicus Curiae Supporting Reversal, *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985) (No. 84-468) [hereinafter referred to as "Cleburne Brief"].
62. *See Cleburne Brief* at 4, 7, 8, 14-15.
63. *Id.*, at 11-14, 16-18.
64. *Id.*, at 18.
65. *United States v. Indiana*, C.A. No. IP 84 411C (S.D. Ind. April 6, 1984) (consent decree). The case concerned conditions in two Indiana mental hospitals, Logansport and Central State Hospitals.
66. *United States v. Maryland*, No. 85-M-277 (D. Md. January 17, 1985) (consent decree), a suit against the Rosewood Center in Owings Mills, Maryland. Rosewood was the subject of *United States v. Solomon*, *supra* note 14, one of the cases that precipitated passage of CRIPA.
67. *See* 1983 Enforcement Hearing, *supra* note 46, at 60, 61, 63-70 and 1985 Fiscal Year Report to Congress Pursuant to Civil Rights of Institutionalized Persons Act at 13 [hereinafter this and other CRIPA reports referred to as "(year) CRIPA Report"]. The CRIPA reports to Congress are filed pursuant to 42 U.S.C. § 1997f. For criticisms of the delays in the Rosewood investigation *see* 1983 Enforcement Hearing, *supra* note 46, at 44-45 (colloquy between Sen. Weicker and Wm. Bradford Reynolds) and 1985 Weicker Staff Report, *supra* note 41, at 165-69.
68. In March 1986, The National Institute analyzed the time periods between initiation of Department of Justice investigations and the sending of 49-day notice letters to the appropriate state and local officials. The shortest time period was one year, in the investigation of Wheat Ridge Regional Center, a mental retardation institution in Colorado. The longest period was with respect to Northville Regional Psychiatric Hospital in Michigan, which was under investigation for two years and three months prior to the letter of findings being sent. The National Institute, *Civil Wrongs and the Handicapped*, 6 Justice Watch No. 1, at 3 (March 1986). These periods only covered the time between the investigation's initiation and the notice letter. Where the Department ultimately decided to sue, there were additional periods of significant delay. For example, in the Wheat Ridge investigation, the Department filed its complaint and accompanying consent decree one year and seven months after sending the above notice letter; the comparable period in the Northville investigation was one year and six months. FY 1986 CRIPA Report. Moreover, as will be discussed below the entry of the consent decree is only the *beginning* of the enforcement process. For other criticisms of the Justice Department's delayed investigations, *see* 1985 Weicker Staff Report, *supra* note 41, at 143-44, 169, and Note, *CRIPA: The Failure of Federal Intervention for Mentally Retarded People*, 97 Yale L.J. 845, 848-50 (1988) [hereinafter referred to as "CRIPA Note"].
69. *See* note 67, *supra*.
70. *See* 1985 Weicker Staff Report, *supra* note 41, at 20-24 (Northville Regional Psychiatric Hospital), 24-25 (South Carolina State Hospital).
71. The discussion of the South Carolina State Hospital investigation, including the letters referred to in this paragraph, appears in the 1985 Weicker Hearings, *supra* note 2, at pages 209-232.
72. The state senator, Arthur Ravenel, testified before Congress that an attorney from the Special Litigation Section told him that the Justice Department would not be able to act quickly in the investigation because of problems it was having under the CRIPA statute. 1985 Weicker Hearings, *supra* note 2, at 211. Those supposed problems were not discussed in greater detail. But even though it is possible to conceive of circumstances in which it could take some months for the Justice Department to develop sufficient information to decide whether to investigate a mental disability facility, there were a number of circumstances in the South Carolina investigation that should have facilitated an expeditious decision to investigate. Among those circumstances were the involvement of the state senator himself (apparently institutional staff had contacted him with their complaints); a legislative investigation of the Department of Mental Health; an investigation

by the Governor's office of the Department that the former was willing to share with the Justice Department; and a knowledgeable newspaper reporter who had written several articles about the problems within the Department. *See id.*, at 220-27. Information that could have been obtained from these sources should certainly have been sufficient to allow the Justice Department to conclude that the conditions within the facility warranted investigation under CRIPA.

73. FY 1986 CRIPA Report, at 34.

74. Enid State School and Pauls Valley State School. These investigations were initiated on April 9, 1982. FY 1982 CRIPA Report, at 6.

75. The author of this section of the report worked for a period of time on the Enid and Pauls Valley investigations, and toured the former facility with several mental retardation experts.

76. FY 1983 CRIPA Report, at 13. The notice of findings letter, usually referred to as the "49-day letter" (because under CRIPA the Department could not bring suit until at least 49 days after notifying the relevant state officials of its findings), is reproduced in the 1983 Enforcement Hearing, *supra* note 46, at 71-78.

77. FY 1985 CRIPA Report, at 21 (Enid); FY 1986 CRIPA Report, at 15 (Pauls Valley). The latter report notes somewhat cryptically that the Pauls Valley investigation was closed after Mr. Reynolds met with state officials. *Id.*

78. Services for Mentally Retarded Persons: Joint Hearing Before the Subcomm. on the Handicapped of the Sen. Comm. on Labor and Human Resources and the Subcomm. on Labor, Health and Human Services, Education, and Related Agencies of the Sen. Comm. on Appropriations, 98th Cong., 2d Sess. 42-43 (1984)(Testimony of Margaret M. Heckler).

79. In United States Department of Justice, *Civil Rights Division: Enforcing the Law: January 20, 1981--January 31, 1987*, 119 (January 31, 1987), the Justice Department cited the Enid and Pauls Valley investigations as implicit examples of the validity of its conciliatory approach to addressing institutional harm. *See also*, 1983 Enforcement Hearing, *supra* note 46, at 41, 54 (Testimony of Wm. Bradford Reynolds). It reported that at Enid State School the number of residents receiving tranquilizing medication had been reduced from 244 to 93, with dosages now carefully controlled. At Pauls Valley, the Department reported that physical restraints had been eliminated, living areas unlocked, and medications reduced. Furthermore, according to the Department, the budget at Pauls Valley increased from $13 million to nearly $16.5 million, with an additional 112 professional and 69 direct care staff employed along with a concomitant reduction of 139 in the number of residents. The Department did not indicate when these changes occurred, nor, in light of the Department's termination of the investigations, what would happen if conditions were to deteriorate, as they have so often within institutions that have promised to change their unconstitutional ways. Moreover, the budget and staffing increase at Pauls Valley was likely to be at least as much a response to the possible loss of federal Title XIX funding (which provides as least 50% of the budget of state mental retardation institutions) as it was to the Department's passive investigation. As discussed below, because the Department attempts to take credit for every positive development in the facilities that it has investigated, whatever the true cause of the changes, it is difficult to ascertain whether such changes occur because of, in spite of, or with little reference to the Department's efforts. One thing, however, is undeniable: it took almost three years at Enid State School and over four years at Pauls Valley State School to accomplish these changes, a pace certainly not quicker than that which would likely have been obtained through litigation. Had the Department litigated the case, or even settled it by consent decree, however, there at least would have been an enforceable judicial order if there had been any backsliding by the state.

80. *See* "Reynolds Document Request," Item I (4) a & b, at 4 (believed to be furnished in connection with the Senate's consideration of the nomination of Wm. Bradford Reynolds for Associate Attorney General. Nomination of William Bradford Reynolds to be Associate Attorney General of the United States: Hearings Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1985) [hereinafter referred to as "Reynolds Nomination Hearings"]).

81. *Homeward Bound, Inc. v. Hissom Memorial Center*, No. 85-C-437-E (N.D. Ok. July 24, 1987). Defendants have appealed the decision to the Court of Appeals for the Tenth Circuit, which has heard oral argument in the case. The court of appeals denied defendants' request for a stay of the district court order. Personal communication with Plaintiffs' attorney.

82. Reynolds Nomination Hearings, *supra* note 80, at 480 (Testimony of Marianne Becker). Ms. Becker added that an Oklahoma newspaper reported that state officials had informally asked the Justice Department to investigate a drowning death at Hissom, "[b]ut Mr. Reynolds said, according to the newspaper article, that if he had ten deaths he'd consider that a serious problem but one he did not consider a serious problem." *Id.*

83. The most obvious example here would be if the Department's investigation focused primarily on a harmful physical environment and the facility undertook new construction to remedy the problem.

84. FY 1982 CRIPA Report, at 4.

85. FY 1983 CRIPA Report, at 11.

86. FY 1984 CRIPA Report, at 7.

87. FY 1985 CRIPA Report, at 12.

88. FY 1986 CRIPA Report, at 4. The Department added that "The entire matter is under review." *Id.*

89. By this time, the Department had also undertaken an investigation of conditions at Napa State Hospital, which was initiated on July 17, 1985. *Id.* at 4, n.87.

90. FY 1987 CRIPA Report, at 3.

91. It is ironic that the notice of findings letters have been dubbed "49-day" letters in light of the lengthy delay between issuance of the letters and the filing of suits or consent decrees. Moreover, the letters notably fail to mention the possibility of filing suit at all and rather simply describe the "major findings" of Justice Department investigations.

92. 1983 Enforcement Hearing, *supra* note 46, at 80-81. *See* also, *id.*, at 74 (49-day letter to Governor Nigh of Oklahoma with respect to Enid and Pauls Valley State Schools).

93. 1985 Weicker Staff Report, *supra* note 41, at 160-61 (comparing letters concerning conditions at Northville Regional Psychiatric Hospital in Michigan and South Carolina State Hospital).

94. *See* 1983 Enforcement Hearing, *supra* note 46, at 117 (Cook Resignation Memorandum). Grafton State School was the subject of Ass'n for Retarded Citizens v. Olson, 561 F. Supp. 473 (D. N.D. 1982) *aff'd*, 713 F.2d 1384 (8th Cir. 1983). *See generally*, Dinerstein, *supra* note 6, at 703, for a discussion of these two intervention cases.

95. *See id.* The case was *Parents Ass'n of the St. Louis State School and Hosp. v. Bond*, C.A. No. 82-0852-(3), (E.D. Mo. filed May 28, 1982), and is referenced in 1983 Enforcement Hearing, *supra* note 46, at 105-06 (Memorandum form William Bradford Reynolds to J. Harvie Wilkinson III).

96. *Id.* The memoranda from the Special Litigation Section requesting intervention also are reproduced in 1983 Enforcement Hearing, *supra* note 46, at 87-104, 107-10.

97. Mr. Reynolds's conclusion that plaintiffs' counsel were adequately representing plaintiffs' interests and did not believe that intervention would be useful, *see* 1983 Enforcement Hearing, *supra* note 46, at 45-46, is disingenuous at best. Staff attorneys from the Special Litigation Section recommended intervention precisely because they saw "plaintiffs' requested relief as a potentially dangerous precedent-setting attempt to prevent state governments from pursuing placement of retarded people in the least restrictive environment consistent with their habilitative needs, even when a state legislature (as in Missouri) has mandated that process." Memorandum from Arthur E. Peabody, Jr. to Wm. Bradford Reynolds Re: Intervention in *Parents Association of the St. Louis State School and Hospital v. Bond*, No. 82-852-C, dated November 9, 1982, *reprinted in id.*, at 87, 88. There is another possible explanation for the denial of the recommendation to intervene. The plaintiffs' attorneys in question had represented the State of Alabama in its negotiations with the Justice Department to settle the *Wyatt* case, discussed earlier. Given the community of interests that developed between Alabama officials and Mr. Reynolds in that negotiation, he may have seen the lawyers more as allies than as the adversaries they necessarily would have been had the Justice Department intervened in support of Missouri's right to seek community placement for some of its institutionalized residents.

98. *Davis and United States v. Henderson*, C.A. No. 77-423-B (M.D. La. December 2, 1983)(consent decree concerning Feliciana Forensic Facility). The Justice Department notified the state of its intention to intervene on April 9, 1982. FY 1982 CRIPA Report at 1-2. It is significant, perhaps, that the investigation of this facility actually began on November 5, 1980, before the private suit was filed, and before the Reagan administration took office. FY 1981 Civil Rights Division Annual Report, at 128.

99. *See*, 1983 Enforcement Hearing, *supra* note 46, at 203 (Statement of Stephen A. Whinston).

100. *See, e.g.*, 1983 Enforcement Hearing, *supra* note 46, at 4-5 (Testimony of Wm. Bradford Reynolds).

101. See note 21, *supra*, and accompanying text.

102. *See, e.g.*, 1979 Senate Hearings, *supra* note 16, at 28 (Sen. Strom Thurmond).

103. *See* House Conference Report, *supra* note 1, at 9.

104. *See, e.g.*, 1983 Enforcement Hearing, *supra* note 46, at 6. The Dixon Developmental Center investigation is discussed, among other places, in Dinerstein, *supra* note 6, at 705-06.

105. Statement of Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Concerning DOJ Authorization Before the Sen. Comm. on the Judiciary, 100th Cong., 2d Sess. 14-15 (May 26, 1988).

106. *See* FY 1981-1987 CRIPA Reports. The report for FY 1987 is the latest available one. 23 of these investigations are of mental health facilities, 21 of mental retardation facilities, and 2 of nursing homes.

107. The twelve cases are as follows: (1) Mental Health Consent Decrees: *United States v. Indiana*, C.A. No. IP 84 411C (S.D. Ind. April 6, 1984) (Central State and Logansport State Hospitals); *United States v. South Carolina*, C.A. No. 3:86-1677-0 (D. S.C. June 24, 1986) (South Carolina State Hospital); *United States v. Michigan*, C.A. No. 86CV73321-DT (E.D. Mi. August 8, 1986)(Northville Regional Psychiatric Center and Ypsilanti Psychiatric Hospital); *United States v. Michigan*, No. K87-346CA(4) (W.D. Mi. October 16, 1987) (Kalamazoo Regional Psychiatric Hospital); *United States v. Illinois*, No. 86-C-7520 (N.D. Il. February 18, 1987) (Elgin Mental Health Center). (2) Mental Health Cases--Consent Decrees Filed After Litigation Commenced: *United States v. Massachusetts*, No. 85-0632-MA (D. Mass. August 25, 1987)(Memorandum Opinion) (Worcester State Hospital; consent decree filed after approximately one week of trial). (3) Mental Retardation Consent Decrees: *United States v. Maryland*, No. 85-M-277 (D. Md. January 17, 1985) (Rosewood Center); *United States v. Colorado*, C.A. No. 86-F1470 (D. Col. July 24, 1986)(Wheat Ridge Regional Center); *United States v. Connecticut*, No. N-86-252 (D. Conn. December 22, 1986) (Southbury Training School; consent decree agreed to July 25, 1986; entry of decree delayed pending resolution of *Dober v. Meese*, No. N-86-195-EBB (D. Ct.)). (4) Mental Retardation Cases--Consent Decrees Filed After Litigation Commenced: *United States v. Louisiana*, No. 87-025 (E.D. La. July 23, 1987) (Metropolitan Developmental Center, formerly Belle Chasse State School; complaint filed January 5, 1987, case settled during discovery). (5) Mental Retardation Cases--Pending: *United States v. Oregon*, No. 86-961-LE (D. Or. filed July 28, 1986) (Fairview Training Center; trial was scheduled for this past summer, but the Justice Department has agreed in principle with defendant officials on a settlement of the case); *United States v. New Mexico*, No. 86-09-32M (D. N.M. filed August 8, 1986) (Fort Stanton State Hospital; inactive, "Since the State has been making a concerted effort to improve conditions at Fort Stanton, we are staying further litigative actions for a short period." FY 1987 CRIPA Report, at 34).

108. 29 U.S.C. § 794.

109. 20 U.S.C. § 1401.

110. See text accompanying note 16, *supra*.

111. See n.107, *supra*.

112. See, *United States v. Indiana*, Settlement Agreement, at 6-7 (Par. II. 2.).

113. See n.107, *supra*.

114. *United States v. Colorado*, Settlement Agreement, at 4.

115. An exception is in *United States v. Massachusetts*, note 107, *supra*, where the consent decree, entered one week after the commencement of trial, defined professional judgment (in minimalist *Youngberg* terms) as a decision by a qualified professional that was not such a substantial departure from professional standards as to reflect the professional's failure to base his or her decision on the exercise of professional judgment. Settlement Agreement at 4, Par. I. 6.

116. *See, e.g.*, *United States v. Colorado*, *supra* note 107, Settlement Agreement at 2, Par. II. 4.

117. At a minimum, a judgment made by a professional and based on such factors as administrative convenience or lack of resources should not be entitled to deference. *See* Costello and Preis, *supra* note 57, at 1550-51.

118. *E.g.*, in *United States v. Maryland*, see note 107, *supra*, the Justice Department's case concerning the Rosewood Center mental retardation facility, the Department notified state officials in its "49-day" letter of February 1982, that the egregious and flagrant conditions identified "have existed for some time, and at least since 1974." Letter from Wm. Bradford Reynolds to Hon. Harry R. Hughes, dated February 19, 1982, at 2, *reprinted in* 1983 Enforcement Hearing, *supra* note 46, at 63, 64.

119. *E.g.*, in *United States v. Indiana*, *supra* note 107, the proposed consent decree was submitted to the district court on March 16, 1984, and approved by it on April 6, 1984. Although the state was required to file various plans by June or July 1984, it was not required to meet various staff: resident ratios until June 30, 1987, or, for psychiatrists and physicians at one of the facilities, June 30, 1988. *United States v. Indiana*, Settlement Agreement at 7, Par. III. 1. The consent decree in *United States v. Connecticut*, *supra* note 107, is the only one that the author has seen that actually has a section entitled "Conditions Requiring Immediate Correction." In addition to requiring that certain staff be hired within thirty days, this section of the decree requires that within thirty days an emergency evacuation plan be devised and that residents not be subjected to improper restraints or seclusion. *United States v. Connecticut*, Consent Decree, at 7-8, Section III. Consent decrees in some other cases require that certain staff:resident ratios be met within comparatively short periods of time, but it is not clear whether the facility fails to meet such standards at the point at which the decree is proposed. Ultimately, the requirements for short-term relief in CRIPA consent decrees are most notable for their rarity.

120. *See, e.g.*, *United States v. Maryland*, *supra* note 107, at 14, Par. VII. 2.

121. The only exception to this silence is in *United States v. Connecticut*, *supra* note 107, where the consent decree specifies that the burden of persuasion with respect to both the initial plans and any modifications is on the state. *United States v. Connecticut*, at 14, Pars. VI. 1. A. and VI. 1. B.

122. *United States v. Michigan*, *supra* note 107, Consent Decree at 18-19, Par. VII. 5 (emphasis added). Identical language appears in a number of other CRIPA consent decrees. Again, there is a slight positive variation in *United States v. Massachusetts*, *supra* note 107. In that consent decree, the United States need only prove that a provision or plan relating to the specific planning objectives of the decree has not been complied with in order to obtain relief from the court. If the noncompliance of the plan relates to matters outside of these areas, the United States must prove that such noncompliance relates to one of the underlying principles of the decree. Settlement Agreement, at 17-18, Pars. V. 4b. & 4c. It perhaps is not coincidental that these superior provisions concerning enforcement and planning occurred in a case that was settled after trial on the merits had begun rather than in one settled earlier in the investigative process.

123. *See, e.g.*, *United States v. Massachusetts*, *supra* note 107, Settlement Agreement at 16, Par. V. 2.

124. The absence of language regarding court enforcement of the plans may not be by chance. In *United States v. Michigan*, 680 F. Supp. 928 (W.D. Mich. 1987) (collecting orders), a CRIPA case concerning conditions at three Michigan prisons, Section attorneys negotiated a detailed proposed consent decree with state officials, only to have Assistant Attorney General Reynolds balk and require them to enter a vague decree coupled with a detailed plan of implementation that would not be part of the order. Section attorneys then were required to research whether there were any cases in which a court had held that under like circumstances a plan of implementation was not enforceable. [See Chapter XXII of this report for a discussion of this issue].

125. *See United States v. Maryland, supra* note 107, Settlement Agreement at 12, Par. VI. 5; *see also, e.g., United States v. Indiana, supra* note 107, Settlement Agreement at 12, Par. V. 3; *United States v. Michigan, supra* note 107, Consent Decree at 12, Par. V. 2; *United States v. Colorado, supra* note 107, Settlement Agreement at 9, Par. V. E. The language in these decrees is almost identical to that quoted in the text.

126. *See, e.g.*, 1983 Enforcement Hearing, *supra* note 46, at 5 (Testimony of Wm. Bradford Reynolds).

127. *See, e.g.*, FY 1986 CRIPA Report, at 28.

128. FY 1987 CRIPA Report, at 26.

129. FY 1986 CRIPA Report, at 30.

130. FY 1987 CRIPA Report, at 33.

131. *See, e.g.*, Lottman, *Enforcement of Judicial Decrees: Now Comes the Hard Part*, 1 Mental Dis. L. R. 59 (1976).

132. *See, e.g.*, Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428 (1977), and R. Burt, *Pennhurst: A Parable*, in *In the Interest of Children* 345 (R. Mnookin ed. 1985).

133. Indeed, the Department's resistance to mechanisms such as review panels and special masters is not limited to its CRIPA litigation. In the pre-CRIPA cases that preceded the Reagan administration but continued after it took office, the Department, for the most part, either opposed or declined to support appointment or continuation of these entities. This nonsupport was true even in the few cases, such as the Willowbrook case, where in other respects the Department continued its strong support for plaintiffs' positions. *See New York State Ass'n for Retarded Children v. Carey*, 551 F. Supp. 1165 (E.D. N.Y. 1982), *aff'd in part, rev'd in part and remanded*, 706 F. 2d 956 (2d Cir.), *cert. denied*, 464 U. S. 915 (1983). *See* Washington Council of Lawyers Report, *supra* note 12, at 91, n.40. The court of appeals upheld the district court's finding of non-compliance with provisions of the Willowbrook consent decree and its appointment of a special master, while concluding that its rejection of defendants' proposed modifications to the decree was based on an unduly restrictive standard of review.

134. *See*, CRIPA Note, *supra* note 68, at 854, n.68 (according to medical director of Southbury Training School, the subject of *United States v. Connecticut, supra* note 107, the Justice Department has sent "federal monitors" to review medical records only three times in the almost two years between the settlement agreement and April 1988). *See also, id.*, at 853, n.66 (according to the former director of Southbury, the Department rejected consent decree monitoring role for groups such as the state association for retarded citizens and the state office of protection and advocacy despite state's willingness for them to participate).

135. *United States v. Connecticut, supra* note 107, Consent Decree at 12, Par. V. 8. *See also, United States v. Colorado, supra* note 107, Settlement Agreement at 10, Par. V. G., containing identical language.

136. *See, e.g.*, 1985 Weicker Staff Report, *supra* note 41, at 2-3, 66-75.

137. The presence of such language in several consent decrees is at least suggestive that the Justice Department is the culprit. In fact, an attorney currently in the Civil Rights Division's Special Litigation Section confirms that the Justice Department has proposed the language. *See also*, Reynolds Nomination Hearings, *supra* note 80, at 110-111 (Memorandum from James L. Sullivan, Legislative Counsel, to Charles J. Cooper, Re: Recommendation to investigate Hissom Memorial Center, dated November 28, 1983) for the following indication that at least one high-ranking Civil Rights Division employee had little understanding of the issues raised by use of physical restraints:

> The memorandum [from the Special Litigation Section proposing an investigation of Hissom] also provides inadequate discussion about the allegations of undue physical restraint. The Constitution does not require treatment in the least restrictive environment. Therefore, physical restraints in excess of the least restrictive do not necessarily violate the Constitution. Furthermore, *restraints imposed because of insufficient staff do not necessarily violate the Constitution*. Therefore, these allegations of undue restraint do not constitute reasonable cause to believe that the State is subjecting residents to egregious or flagrant conditions that violate the residents' constitutional rights. Emphasis added.

138. 29 U.S.C. § 794.

139. 20 U.S.C. § 1401 *et seq.*

140. 42 U.S.C. § 6001 *et seq.*

141. *See, e.g., United States v. Maryland, supra* note 107, Settlement Agreement at 4, Par. III. 5 (general principle providing that "pursuant to section 504 . . ., no resident shall be deprived of services on the basis of severity of handicap," but no relief directed at ensuring that services are provided to this population); *United States v. Colorado, supra* note 107, Settlement Agreement at 5, Par. III. 6 (general principle providing that "[t]he defendants shall facilitate, within the constraints of their lawful authority, the provision of a free, appropriate public education to residents between the ages of five and twenty-one which requirement is consistent with the Education of the Handicapped Act . . .," but no reference in decree or plans to the needs of school-age residents of the institution).

142. See note 57, *supra*, and accompanying text.

143. *See, e.g., United States v. Maryland, supra* note 107, Settlement Agreement, at 5, Par. IV. 1. ("At the State's discretion, the [staffing] ratios may be attained by hiring additional needed staff or by reducing appropriately the resident population of the Rosewood Center according to professional judgments made by qualified staff to place Rosewood Center residents in community alternatives or other placements which are fully protective of their constitutional rights.") Ironically, the State of Maryland filed an *amicus curiae* brief in the Supreme Court in the *Cleburne case*, see note 59 *supra*, in which it urged affirmance of the court of appeals' decision (as against the Justice Department's urging reversal, see text accompanying notes 59-64, *supra*) because of its perception that the decision facilitated creation of needed additional community placements. The brief noted:

> The need for additional community placements in Maryland is particularly acute at this time because of the Consent Decree. . . . In order to implement the provisions of that agreement, Maryland is substantially reducing the population of Rosewood, its largest facility for the retarded. The realization of this goal is contingent on an increased number of community based programs for the mentally retarded.

Brief for the State of Maryland As *Amicus Curiae* in Support of Respondents, *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985) (No. 84-468) 3. @COL1 =144.
See CRIPA Note, *supra* note 68, at 852-54 (criticizing Department of Justice decrees for failing to provide for monitoring of community placements, and noting that failure is all the more problematic because state in one case informed Department officials of its intent to deinstitutionalize residents to satisfy the consent decree).

145. U.S. Department of Justice, *Civil Rights Division: Enforcing the Law, January 20, 1981--January 31, 1987* (1987), at VI. 1 (Emphasis added).

146. See *supra* note 107. The district court considered the proposed intervention in its Memorandum and Order dated April 28, 1986.

147. Plaintiff-Intervenors' Memorandum in Support of Their Motion to Intervene, January 24, 1986, at 16-21.

148. Plaintiff's Memorandum in Opposition to Proposed Plaintiff-Intervenors' Motion for Leave to File a Complaint in Intervention, at 22 (March 10, 1986) (hereinafter "Plaintiff's Opposition").

149. *United States v. Massachusetts*, Civil Action No. 85-0632-MA (D. Mass. April 28, 1986) (Memorandum and Order). Unless otherwise noted, references in this paragraph are to the court's memorandum opinion.

150. *Id.* The Department of Justice did indicate that resident participation as *amici curiae* "might well be appropriate." Plaintiff's Opposition at 19, n.6.

151. *United States v. Massachusetts*, Memorandum and Order, at 16.

152. On a purely analytical level, the district court's judgment that the proposed intervention was untimely, and that the CRIPA litigation would not preclude a later lawsuit by the proposed intervenors, was technically supportable. The court, however, appeared to understate the practical effect that a judgment in the CRIPA case would have in a later case, let alone the significant resource constraints limiting the ability of the residents to bring an independent action.

153. *See*, Plaintiff-Intervenors' Memorandum in Support of Their Motion to Intervene, at 3.

154. *See*, Plaintiff's Opposition, at 3-8.

155. *See*, *United States v. Oregon*, No. 87-3671 (9th Cir. 1988).

156. United States' Response to Proposed Plaintiff-Intervenors' Motion to Intervene, filed on or about October 28, 1986, at 6.

157. See *supra* note 107.

158. 42 U.S.C. § 6001 *et seq.*

159. *See* Complaint in *Dober v. Meese*, Civil No. N-86-195 (EBB), filed June 5, 1986, at 11, Par. 29 (excerpt of letter from Connecticut Attorney General to Assistant Attorney General Reynolds expressing support for involvement of P & A agency in negotiations). *Cf.*, CRIPA Note, *supra* note 68, at 853, n.66 (State officials willing to have P & A agency and others participate in enforcement of CRIPA decree).

160. *See*, *Dober v. Meese*, Civil No. N-86-195 (EBB) (D. Conn. September 15, 1986), Ruling on Pending Motions.

161. As they would have to under Federal Rule of Civil Procedure 23 (e) if the case had been brought as a class action.

162. Several agencies, including the P & A agency, attempted to intervene in the CRIPA case once the consent decree was entered, but the court denied these motions as well. *See* CRIPA Note, *supra* note 68, at 854-55.

163. *See* Dinerstein, *supra* note 6, at 700 and 1983 Enforcement Hearing, *supra* note 46, at 213 (Testimony of Stephen Whinston).

164. *See* Reynolds Nomination Hearings, *supra* note 80, at 132-33, 929-952 (colloquies between Senator Simon and Wm. Bradford Reynolds; affidavits, memoranda, and letters from Special Litigation Section attorneys who left section). *Cf.*, 1983 Enforcement Hearing, *supra* note 46, at 48-49 (colloquy between Senator Weicker and Mr. Reynolds).

165. *See, e.g.*, J. Conroy and V. Bradley, *The Pennhurst Longitudinal Study: Combined Report of Five Years of Research and Analysis* (1985).

166. *See* D. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (1971).

167. 465 U.S. 89 (1984).

168. *See* Costello and Preis, *supra* note 57, at 1536-38.

169. *United States v. County of Los Angeles*, 635 F. Supp. 588 (C.D. Cal. 1986). *See also*, *United States v. Hawaii*, 564 F. Supp. 189 (D. Haw. 1983) (state would not allow Justice Department in to its prisons to conduct CRIPA investigation; Department filed CRIPA suit which was dismissed for failure to follow statutory procedures).

170. S. 1540, 100th Cong., 1st Sess., 133 Cong. Rec. 10690 (1987). The identical bill was introduced in the House on July 28, 1987, as H.R. 3033 by Representative Ravenel. H.R. 3033, 100th Cong., 1st Sess., 133 Cong. Rec. 6741 (1987).

171. *See*, *supra*, S. 1540, Section 2 (d), note 170.

172. *Id.*, Sections 2 (b), (c).

173. This is not a fanciful possibility, as the extensive involvement of disgruntled parent and staff groups in the *Pennhurst* litigation demonstrates.

174. In the analogous area of school desegregation litigation, a student commentator has argued for participation by affected parties in court hearings on proposed Justice Department consent decrees. Note, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 Yale L.J. 1811 (1986).

175. 42 U.S.C. § 1997h.

176. *See* 1985 Weicker Staff Report, *supra* note 41, at 132-33.

177. See discussion of Pauls Valley State School, *supra* at text accompanying note 78.

178. 675 F. Supp. 1249 (D. Or. 1987).

Chapter XXIII

1. Civil Rights of Institutionalized Persons Act: Hearing before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 98th Congress, 1st and 2nd Sess. 87(1983-84) [hereinafter Congressional Hearings] (Statement of Kenneth F. Schoen, Director, Justice Program, Edna McConnell Clark Foundation).
2. *See Weems v. U.S.*, 217 U.S. 349 (1910).
3. *See* Bronstein, *infra* note 23 at 22 (discussing *Kaimowitz v. Dept. of Mental Hygiene*).
4. *See* J. Conrad, "An Expert Reflects on the Changing Face of Prison Litigation" 8 *National Prison Project Journal* [hereinafter "NPPJ"] 12 (Summer 1988) (discussing *Pugh v. Locke*).
5. *See* J. Elvin, "Oklahoma Prisoner Earns Place in History" 10 NPPJ 1 (Winter 1986) (discussing *Battle v. Anderson*).
6. *Id.*
7. *See Id.*
8. According to the U.S. Sentencing Commission, the number of federal prisoners could double to 83,000 in the next five years and may nearly quadruple in 15 years. Nathan, Vincent, "Lawsuits Fundamental to Prison Reform," 13 NPPJ 16 (Fall 1987).
9. "A Symposium on Prison and Jail Overcrowding," 25 *The Judges Journal* 9 (Winter 1986).
10. *Id.*
11. E. Hennessey, "Why our Jails Are Suddenly Overcrowded," 25 *The Judges Journal* 10 (Winter 1986).
12. *Id.* at 10.
13. M. DeGennaro, "A Prisoner's Right to Be Free From Sexual Abuse: An Expanding Role for Federal Courts," 18 *Creighton L. Rev.* 1113, 1124 (1984)."
14. S. H. Miles, Health Professionals and a Preventable Death at Butner," 16 *NPPJ* 9 (Summer 1988).
15. *Id.*
16. *Id.*
17. DeGennaro, *supra* note 13, at 1113.
18. *Id.* at 1124.
19. L. Moriarity, "AIDS in Correctional Institutions: The Legal Aspects," *Crim. Law Bull.* 553 (Nov.-Dec. 1987).
20. *See* H. Rowe, "Death Row: AIDS is Turning a Prison Term into a Potential Death Sentence," *California Lawyer*, 49-51 (September 1987).
21. *Id.* at 51.
22. Rowe, *supra*,note 20, at 51.
23. A. Bronstein, Offender Rights Litigation: Historical and Future Developments, 21; *see also* I. Robbins, *Prisoners and the Law* 5-26 (1987).
24. *Id.* at 22.
25. *Cody v. Hillard*, 599 F.Supp. 1025 (D.S.D. 1984).
26. A. Aiyetoro, "Racism and Prison," *ACLU National Prison Project* (November 18, 1987).
27. N. Taifu-Caldwell, "Muslims in Prison Seek Religious Recognition," 8 *NPPJ* 3 (Summer 1985).
28. A. Bronstein, "Neglect of Prisons Reap High Costs for Society," 7 *NPPJ* 12 (Spring 1986).
29. *See e.g.*, *Cody*, 599 F. Supp. at 1029.
30. *See e.g.*, R. Immarigean, "Few Diversions are Offered Female Offenders," 9 *NPPJ* 9 (Summer 1987).
31. Bronstein, *supra*, note 23, at 8.
32. K. Krajick, and S. Gettinger, "Overcrowded Time," Edna-McConnell Clark Foundation (1982).
33. *See generally*, Bronstein, *supra*, note 23, at 6.

34. That prisoners have no more rights than slaves was written by a Virginia judge in *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).
35. Bronstein, *supra*, note 23, at 2-4; Robbins, *supra* note 23, at 6.
36. Bronstein, *supra* note 23, at 6.
37. Robbins, *supra* note 23, at 2-5.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 2-6. *See e.g.*, *Palmigiano v. Garrahy*, 443 F.Supp. 956, 979 (D. R.I. 1977), *remanded*. 599 F.2d 17 (1st Cir. 1979); *Battle v. Anderson*, 564 F.2d 388, 403 (10th Cir. 1977); *see*, *Laaman v. Helgemoe*, 437 F. Supp. 269, 323 (D. N.H. 1977) (eighth amendment violated when conditions threaten "physical, mental, and emotional health and well-being of the inmates and/or create a probability of recidivism and future incarceration").
43. Robbins, *supra* note 23, at 2-8.
44. 416 U.S. 396 (1974). In *Martinez*, the legality of the California Department of Corrections' mail censorship rules were at issue. Balancing competing obligations, the Court found that its obligation "to take cognizance of valid constitutional claims" outweighed any "policy of judicial restraint." *Id.* at 405. The Court invalidated the Department's regulations and announced that censorship rules must be no greater than necessary to support a legitimate institutional objective. *Id.* at 413-14.
45. *Id.* at 405.
46. Robbins, *supra* note 23, at 2-8.
47. *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Rhodes v. Chapman*, 452 U.S. 337 (1981).
48. W. Collins, "The Defense Perspective on Prison-Conditions Cases" *Prisoners and the Law*, 7-3 -7-14 (1987).
49. *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982).
50. *See Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983), *cert. denied* 104 S. Ct. 3587 (1984).
51. D. Gottlieb, "The Legacy of Wolfish & Chapman: Some Thoughts about "Big Prison Case" Litigation in the Eighties," *Prisoners and the Law*, 2-3 - 2-21 (1987).
52. *Ruiz v. Estelle*, 679 F.2d 1115, 1145 (5th Cir. 1982).
53. *Id.* at 1146-47.
54. *See generally*, accompanying text at 420-429.
55. Civil Rights Act of 1957, Pub. L. No. 85-317, 71 Stat.634 (codified as amended at 42 U.S.C. §1975 (1976 & Supp. V (1981).
56. R. Plotkin, "Reagan Civil Rights: The First Twenty Months -- A Report By The Washington Council of Lawyers," 1 *N.Y.L.S. Human Rights Annual* 147 (1983).
57. *Id.* at 84. *See, e.g.*, 1968 Att'y Gen. Ann. Rep. 67.
58. The Special Litigation Section of the Civil Rights Division derives its authority from several different federal statutes. The Section has broad jurisdiction to enforce Titles II and III of the Civil Rights Act of 1964; §504 of the Federal Rehabilitation Act of 1973,29 U.S.C. §794 (1976 & Supp. V 1981); the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997-1997j (Supp. V 1981); Titles II through VII of the Civil Rights Act of 1968 (the Indian Civil Rights Act), 25 U.S.C. §1301 (1976); the Education of the Handicapped Act, 20 U.S.C. §1401 (1976 & Supp. V 1981);and the Revenue Sharing Act, 31 U.S.C. §1242 (1976).
59. Plotkin, *supra* note 56, at 149.
60. *Id.*
61. *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); *United States v. Solomon*, 419 F. Supp. 358 (D. Md.1976), *aff'd*, 563 F.2d 1121 (4th Cir. 1977).
62. 600 F.2d at 1297; 419 F. Supp. at 362; 563 F.2d at 1125.
63. Department of Justice, "*Enforcing The Law: January 20, 1981 - January 31, 1987,*" 1.
64. Plotkin, *supra* note 56, at 150.

65. 42 U.S.C. §1997 (1981).
66. 1982 Att'y Gen. Ann. Rep. 159.
67. 42 U.S.C. §1997a(a). *See, e.g., U.S. v. Michigan*, Brief at 14.
68. *See Congressional Hearings*, *supra* note 1, at 9.
69. *Congressional Hearings*, *supra* note 1, at 109. (Statement of Bradford Reynolds).
70. *Id.* at 128.
71. *Id.* at 113-14.
72. *See*, *United States v. Michigan*, 116 F.R.D. 655, 663 (W.D. Mich. 1987). Judge Enslen, in *Michigan*, expressed his confusion at this terminology, "I cannot distinguish between 'minimum corrective measures' and measures necessary to protect the inmates' constitutional rights." *Id.*
73. *See Congressional Hearings*, *supra* note 1, at 114.
74. 46 Fed. Reg. 3,843-3,852 (January 16, 1981).
75. 46 Fed. Reg. 36,843-36,869 (July 16, 1981).
76. *Federal Standards for Prisons and Jails*, (GPO, December 16, 1980).
77. "Change in Preamble of Federal Standards for Prisons and Jails, December 16, 1980" (July 23, 1981).
78. "In an Era of Cutbacks, Justice Department Grows," 15 *Crim. Just. Newsl.* 2 (Feb. 1, 1984).
79. 457 U.S. 307; Although *Youngberg* concerned the conditions of confinement in mental health facilities particularly the provision of care and treatment to patients confined therein, and thus is not directly relevant to our report, the interpretation given to it by Reynolds clearly demonstrates his approach to CRIPA.
80. Memorandum from Arthur E. Peabody, Jr., Acting Chief, Special Litigation Section to J. Harvie Wilkinson, Deputy Assistant Attorney General, Civil Rights Division (August 4, 1982).
81. Memorandum from Bradford Reynolds to Arthur E. Peabody Jr. 1-2 (June 24, 1982).
82. *See Plotkin*, *supra* note 56, at 84.
83. *Congressional Hearings*, *supra* note 1, at 2.
84. *Id.* at 17. *See* also, Resignation from the Department of Justice, from Timothy M. Cook to William French Smith, Attorney General (October 18, 1983).
85. Interview with Adjoa Aiyetoro (July 26, 1988).
86. 553 F. Supp. 567 (S.D. Tex. 1982).
87. App. No. 81-2224 (5th Cir.), Brief of United States, at 93. It may be noted that conditions of overcrowding were so severe in Texas' prisons and jails that it was not uncommon to have 3 or 4 inmates sharing 45 square foot cells, causing these inmates to sleep with their heads only inches away from toilets. *Ruiz v. Estelle*, 503 F. Supp. 1265, 1277 (S.D. Tex. 1980).
88. No. G.C. 71-6-K (N.D. Miss. 8/16/83) [earlier opinions at 423 F. Supp. 734 (N.D. Miss. 1976), *aff'd and remanded*, 548 F.2d 1241 (5th Cir. 1977)].
89. *Id. Quoted in Congressional Hearings*, *supra* note 1, at 542.
90. C.A. No. 74-2412 "C" (E.D. La.).
91. Plaintiff's Supplemental Memorandum in Support of Motion to Approve Placement Procedure Order 4 (November 15,1983) *Quoted in Congressional Hearings*, *supra* note 1, at 542.
92. No. Civ. 72-95 (E.D. Okla.).
93. Application filed November 21, 1983, and *see* 708 F.2d 1523 (10th Cir. 1983).
94. No. 83-317 (U.S.).
95. Memorandum for the United States as *Amicus Curiae* (October Term, 1983) *repinted in Congressional Hearings*, *supra* note 1, at 806-18. (The Justice Department argued that *Rutherford* went beyond what was constitutionally mandated in light of *Bell v. Wolfish*; not enough deference was given to the security concerns of the jail authorities). *See* also statements by Congressman Conyers questioning Mr. Reynolds on this "odd" action, *Congressional Hearings*, *supra* note 1, at 124.
96. *Id.* at 111.
97. Report of the Attorney General to Congress Regarding Activities Initiated Pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997 (As required by 42 U.S.C. §1997(f)) (FY 1982).

98. *The National Prison Project Quarterly Report* 7 (A Report of Activities for the Quarter Ending March 31, 1988).
99. *Congressional Hearings, supra* note 1 at 117.
100. Alexander, "Justice Department Retreats: The Michigan Case," 1 *NPPJ* 1, 5 (Fall, 1984).
101. *Id.*
102. *Hadix v. Johnson.*
103. Bench Opinion of March 23, 1984 Granting Hadix plaintiffs and the National Prison Project *Amicus Curiae* status; *repinted in United States v. Michigan I,* 680 F.Supp. 928, 935-943 (W.D. Mich. 1987).
104. G84-651.
105. Quarterly Report, *supra* n.98, at 8.
106. *Congressional Hearings, supra* note 1, at 117.
107. *Id.* at 120.
108. Alexander, *supra* note 100, at 5.
109. Bench Opinion of March 23, 1984 Rejecting Proposed Consent Decree; *repinted in* Michigan I, 680 F. Supp. at 947.
110. Bench Opinion of June 22, 1984 Denying Janson Plaintiffs and *Knop* Plaintiffs' Motions to Intervene and Approving Consent Decree, *repinted in Michigan I,* 680 F. Supp. at 949. For a copy of the final Consent Decree, *see Congressional Hearings, supra,* note 1, at 573-85.
111. *See, e.g., United States v. Michigan II,* 116 F.R.D. 655, 664 (W.D. Mich. 1987) (granting the National Prison Project litigating *amicus* status), "Granting the Knop *amicus* litigating status is consistent with the plaintiff's obligations and authority under CRIPA; in particular, its obligations to assist inmates who are seeking to protect their constitutional rights. In that respect, I cannot understand why the plaintiff opposes the *amicus'* request." *See* also *Michigan I,* 680 F. Supp. at 985 ("I cannot see why allowing the *Knop amicus* to present two witnesses would prejudice the United States."); Id. at 970 ("The Court quite frankly was surprised at the strength of the United States' opposition to the Hadix Plaintiffs' request.")
112. United States' Brief in Opposition to the Appointment of Special Master (July 3, 1985).
113. *See, e.g.,* Judge Enslen's comments, Michigan I, 680 F. Supp. at 1047 ("That is the state's assignment anyway. I am not sure what I need to say to Justice tonight."); *see also* Letter from Bradford Reynolds to Judge Enslen (March 15, 1985) (Reynolds arguing against inmates' contention that their constitutional rights were being violated).
114. *Id. Michigan I,* 680 F. Supp. at 999. The Court followed this commendation with the hope that the plaintiff "monitors the other issues encompassed by the Consent Decree and the State Plan as vigorously . . . and leave it to the Court . . . to decide what the constitution requires."
115. Interview with Adjoa Aiyetoro (July 26, 1988).
116. *Congressional Hearings, supra* note 1, at 163.
117. *Congressional Hearings, supra* note 1, at 84 (testimony of Kenneth F. Schoen, Director, Justice Program, Edna McConnell Clark Foundation).
118. S. Rep. No. 96, 96th Cong., 1st Sess. 3 at n.88 (1979).
119. Plotkin, *supra* note 56, at 101.
120. *"Rights of Institutionalized Persons," Civil Rights Division, Enforcing the Law: January 20, 1981-January 31, 1987.*
121. *Id. See also,* Federal Year Reports to Congress Pursuant to Civil Rights of Institutionalized Persons Act, for years 1981-1986.
122. *See* Appendix A.
123. *Id.*
124. Two cases involving prisoners were litigated, *United States v. Hawaii,* 569 F. Supp. 189 (D.Hawaii 1983) and *United States v. Los Angeles,* 656 F. Supp. 588 (C.D. Cal. 1986), but neither dealt with prisoners' rights. Hawaii involved procedural requirements under CRIPA and Los Angeles concerned Justice Department access to juvenile hall records.
125. *See* discussions of Michigan, *supra* at 27-35, Wisconsin, *infra* at 45-46.
126. Congressional Hearings, *supra* note 1, at 107-08.

127. *Id.* at 8 (testimony of Robert Plotkin); *see also Id.* at 115 (statement of Hon. Robert W. Kastenmeier, Chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice).
128. *See Id.* at 10 (testimony of Robert Plotkin). However, it is noteworthy that in actuality CRIPA's requirement of negotiation merely codified the existing practice of the Division and represented little that was new as a way of doing business. Therefore, CRIPA need not be read as Reynolds does to create new hurdles or policy preferences.
129. *Id.* at 109 (testimony of Hon. William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice).
130. *Id.* at 143.
131. *Id.* at 5.
132. United States Code Congressional and Administrative News (1980) p. 809.
133. *Congressional Hearings*, *supra* note 1, at 166 (testimony of Timothy M. Cook).
134. *Congressional Hearings*, *supra* note 1, at 127 (statements of Congressman Kastenmeier).
135. Letter from Reynolds to Governor Dreyfus (June 17,1982), regarding Investigation of Wisconsin Prison System; *repinted in Id.* at 326-28.
136. Response to Investigation of Wisconsin Prison System by U.S. Department of Justice, Civil Rights Division; *repinted in Id.* at 331-37.
137. Letter from Reynolds to Congressman Don Edwards (May 24, 1983); *repinted in Id.* at 338-39.
138. Memorandum from Reynolds to All Employees (August 19, 1981).
139. *Id.*
140. Conversations with a former Special Litigation staff attorney indicate that this policy is still in effect.
141. Memorandum from Smith to Giuliani, Jenson, Carlson and Turner (March 27, 1981).
142. Memorandum from Reynolds to Wilkinson and Peabody (November 23, 1982) reprinted in Congressional Hearings *supra*,note 1, at 622.
143. *Id.* at 145.
144. Indeed, these factors were noted in the legislative history of CRIPA. "[T]he Justice Department invariably has brought to the litigation process investigative resources, technical advice, and legal expertise unavailable to private litigants. Courts have been openly appreciative of these efforts." H.R. Conf. Rep. No. 897, 96th Cong., 2d Sess. 8-9 (1980)
145. Alexander, *supra*, note 100, at 4, n.8.
146. *Congressional Hearing*, *supra*, note 1, at 22 (testimony of Timothy M. Cook).
147. *Id.*
148. *Id.* at 14-15.
149. *See, e.g.*, the plaintiff-class' motion in *Ruiz v. McCotter*, No. H-78-987 CA (private action brought by class of prisoners against the Texas Department of Corrections), entitled *Motion to Dismiss United States as Plaintiff-Intervenor or, in the Alternative, to Realign United States as Party Defendant* September 22, 1986.
150. Interview with Adjoa Aiyetoro, National Prison Project (July 26, 1988).
151. *Congressional Hearings*, *supra*, note 1, at 95. (Prepared Statement of Donald Murray, Director Criminal Justice Program).
152. Hennessey, *supra*, note 11, at 10.
153. *Id.*
154. *Id.*
155. Symposium, *supra* note 9, at 9.
156. *Id.*
157. Hennessey, *supra* note 11, at 11.
158. *Id.*
159. *Id.*
160. *Id.*
161. Krajick, *supra* note 32, at 26-34.

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162. Moriarity, *supra* note 19, at 537.
163. *Id.* at 534.
164. *Id.* at 538.
165. *Id.* at 541.
166. *Id.* at 542.
167. *Id.* at 533.
168. *Id.* at 533.
169. J. W. Hauser, "The Litigation Approach to Overcrowding Problems," 2, Conference Committee on Overcrowded Jails.
170. *Congressional Hearings*, *supra* note 1, at 154. (Testimony of Stephen A. Whinston)
171. *Id.*
172. *Id.* at 11-12.
173. *Id.*
174. "Prison Reform: Executive Leadership is the Missing Link," *The Christian Science Monitor* (May 12, 1988).
175. *Id.*
176. *Id.*

Chapter XXV

1. *Toward Independence*, National Council on the Handicapped, February 1986, 47.
2. Public Law 94-142
3. Public Law 96-88
4. 20 U.S.C. 1400 et seq.
5. 42 Fed. Reg. 42476.
6. 45 Fed. Reg. 77368.
7. 20 U.S.C. 1402.
8. 29 U.S.C. 701 et seq. The regulations implementing the vocational rehabilitation program aspects of the Rehabilitation Act are found at 34 C.F.R. Part 361 et seq.
9. 34 C.F.R. Part 366
10. 34 C.F.R. Part 396
11. 34 C.F.R. Part 350 et seq.
12. 29 U.S.C. 791
13. 29 U.S.C. 794
14. Public Law 93-112
15. 41 Fed. Reg. 17871
16. 45 Fed. Reg. 72995
17. 42 Fed. Reg. 22677
18. 45 Fed. Reg. 30936. They are now codified in 34 C.F.R. Part 104
19. 20 U.S.C. 2334
20. 458 U.S. 176 (1982)
21. 471 U.S. 359 (1985)
22. 108 Sup. Ct. 598 (1988)
23. 486 U.S. 992 (1984)
24. *See also, Irving Independent School Dist. v. Tatro*. 468 U.S. 883 (1984).
25. Public Law 99-372
26. 46 Fed. Reg. 4912
27. 46 Fed. Reg. 12495
28. 46 Fed. Reg. 18975
29. 46 Fed. Reg. 25614
30. 468 U.S. 883 (1984)
31. 53 Fed. Reg. 10808
32. 53 Fed. Reg. 8390
33. 52 Fed. Reg. 44346
34. 52 Fed. Reg. 44352
35. 53 Fed. Reg. 15776

Chapter XXVI

1. *Toward Independence*, National Council on the Handicapped, February 1986, 6.
2. *Id.*, at 32.
3. 356 F.Supp 92 (D.D.C. 1973), modified on appeal, 480 F.2d 1159 (D.C.Cir. 1973).
4. 42 U.S.C. 1395 et seq.
5. 42 U.S.C. 1396 et seq.
6. 42 C.F.R. 405.310.
7. 42 C.F.R. 440.230.
8. When a hospital's impatient reimbursement is based on the diagnosis of an individual and not the individual's actual care needs, there is a strong financial incentive to select those patients who are unlikely to exceed the average length of stay or anticipated intensity of services. Similarly, when a nursing home's reimbursement is the same per day regardless of the health needs of a particular patient, the nursing home has a strong financial incentive to select healthier patients who will require less services.
9. 42 U.S.C. 401 et seq.
10. 42 U.S.C. 1381 et seq.
11. As found by the district court in a decision affirmed by the Supreme Court, evidence of a "fixed clandestine policy against those with mental illness was overwhelming. *Bowen v. City of New York*, 476 U.S. 467, 475 (1985), citing *City of New York v. Heckler*, 578 F.Supp. 1109, 1115 (E.D.N.Y. 1984).
12. 42 U.S.C. 6000 et seq.
13. 42 U.S.C. 608
14. 42 U.S.C. 705 et seq.
15. 29 U.S.C. 791
16. 29 U.S.C. 794
17. 41 Fed. Reg. 17871
18. 45 Fed. Reg. 72995
19. 42 Fed. Reg. 22677. They are now codified in 45 C.F.R. Part 84 and were not repromulgated after the passage of Public Law 96-88.
20. 37 Fed. Reg. 182
21. 42 C.F.R. 53.113
22. 42 C.F.R. 53.154(d)(2)(ii).
23. *Nat'l Ass'n for the Advancement of Colored People v. Wilmington Medical Center, Inc.*, 491 F.Supp. 290 (D.Del. 1980), affirmed 657 F.2d 1322 (3rd Cir. 1981).
24. See, for example, *Alexander v. Choate*, 469 U.S. 287 (1985).
25. 47 Fed. Reg. 26027.
26. 48 Fed. Reg. 9630.
27. *American Academy of Pediatrics v. Heckler*, 561 F.Supp. 395 (D.D.C. 1983).
28. 48 Fed. Reg. 30851.
29. 47 U.S. 610 (1986).
30. 465 U.S. 624 (1984).
31. *California Welfare Rights Organization v. Richardson*, 348 F.Supp. 491 (N.D.Cal. 1972).
32. 45 C.F.R. Part 46.
33. *Crane v. Mathews*, 417 F.Supp. 532 (N.D.Ga. 1976).
34. 47 Fed. Reg. 9208.
35. 47 Fed. Reg. 12276.
36. 53 Fed. Reg. 4425.
37. 53 Fed. REg. 25595.

38. P.L. 97-35.
39. 42 C.F.R. 440.230.
40. 469 U.S. 287 (1985).
41. "Investigation of the Office for Civil Rights in the Department of Health and Human Services," House Report 100-56 (April 15, 1987).
42. 42 C.F.R. 431.53.
43. *U.S. v. Baylor University Medical Center*, 736 F.2d 1039 (5th Cir. 1984), *cert den.* 469 U.S. 1189 (1984).

Chapter XXVII

1. *See* R. Burgdorf, "Discrimination Against Handicapped People," in *Accommodating the Spectrum of Individual Abilities* (Sept. 1983).
2. *See*, *Ray v. School District of DeSoto County*, 666 F.Supp. 1524 (M.D.Fla. 1987); *Thomas v. Atascadero Unified School District*, 662 F. Supp. 376 (C.D.Cal. 1986).
3. *See, e.g.*, *Chalk v. United States District Court*, 840 F.2d 701 (9th Cir. 1988).
4. *See*, *Doe v. Centinela Hospital*, No. CV-87-2514-PAR (C.D. Cal. 1988) (challenging exclusion of HIV infected individual from alcohol and drug rehabilitation program; *Dallas Gay Alliance v. Dallas County Hospital District*, Civil Action No. CA3-88-1394-H), N.D. Tex. (challenging hospital policies providing inadequate medical care for people with AIDS).
5. *See*, *Leckelt v. Board of Commissioners of Hospital District No. 1*, Case No. 86-4235, E.D. La. (challenge to hospital's demand that a nurse undergo HIV antibody test).
6. *See*, *Local 1812, AFGE v. Department of State,* 662 F. Supp. 50 (D.D.C. 1987).
7. 107 S. Ct. 1123, 1128 (1987).
8. *Grove City College v. Bell*, 465 U.S. 555 (1984).
9. National Academy of Sciewnce, Institute of Medicine, *Confronting AIDS*
10. *Id.* at 75.
11. *Report of the President's Commission o the Human Immunodeficiency Virus Epidemic*, at 73-74 (June 1988).
12. *Id.* at 134-135.
13. *Id.* at 156.

Chapter XXVIII

1. *Disability, Functional Limitation, and Health Insurance Coverage: 1984/85*, The Bureau of the Census, December 1986.
2. *Also see*, National Council on the Handicapped, *On the Threshold of Independence: A Report to the President and to the Congress of the United States*, January 1988.
3. *Toward Independence*, *supra* at 1.
4. 29 U.S.C. 791.
5. 29 U.S.C. 791.
6. 29 U.S.C. 794.
7. 42 U.S.C. Section 4151, *et seg*.
8. 42 U.S.C. Section 4151.
9. 29 U.S.C. 792.
10. 49 F.R. 31625 (August 7, 1984), 41 CFR 101.
11. 12 U.S.C. Section 1701q.
12. 12 U.S.C. 1701s.
13. 12 U.S.C. Section 1701q (a) (2) (A).
14. Uhlhorn, Wm., *Creating a Caring Community: Developing Housing for the Mentally Ill*, Oregon Community Support Project (2d Printing 1982), 109. (Available from the National Alliance for the Mentally Ill, Arlington, Virginia).
15. 24 C.F.R. Part 8, 53 Fed. Reg. 20216 (6-2-88).
16. Executive Order 11914, 41 FR 17871, April 28, 1976.
17. 45 C.F.R. Part 85, 43 Fed. Reg. 2132 (January 1978).
18. 43 Fed. Reg. 16652 (4-19-78).
19. 48 Fed. Reg. 22470 (5-18-83).
20. 5 U.S.C. Section 553.
21. *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, *cert. den.* 459 U.S. 835 (1983).
22. Bonnie Milstein, "HUD Rules on Rights of Disabled Create Discrimination--and a Coalition," *City Limits*, January 1986, at 10.
23. 48 Fed. Reg. 27528 (6-15-83).
24. 42 U.S.C. 3601 ff.
25. 12 U.S.C. Section 1701q(a)(2).
26. 12 U.S.C. Section 1701q(d)(4).
27. HUD Handbook 4571.IREV2, Section 202 Direct Loan Program for Housing for the Elderly or Handicapped Processing Handbook (March 1983) [Hereinafter Handbook 4571.1 REV2].
28. 12 U.S.C. Section 1701q(f); 24 C.F.R. Section 885.210.
29. *Brecker v. Queens B'Nai Brith Housing*, 607 F. Supp. 428 (E.D. N.Y. 1985), *aff'd.*, 798 F.2d 52 (2d Cir. 1986).
30. *See*, *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343 (10th Cir. 1987); *Edge v. Pierce*, 54 F.Supp. 1300 (N.J. 1982); *but see*, *Bolthouse v. Continental Wingate Co., Inc.*, 656 F. Supp. 620 (W.D. Mich., 1987).
31. Report on the *Housing Act of 1985*, House Committee on Banking, Finance and Urban Affairs, 99th Cong., 1st Sess., Rept. No. 99-230 (July 26, 1985) at 36-37.
32. 42 U.S.C. 3601.
33. Testimony of John Knapp, General Counsel, HUD, before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the House of Representatives on H.R. 4119, 99th Cong., 2d Sess., July 17 and 18, 1986.
34. *Id.*
35. Section 804(f)(2)(A)(ii).

36. Unpublished Order, Case No. 79-1979 WPG, June 17, 1981.
37. HUD's Federal Register notice appears at 46 Fed. Reg. 37088 (July 17, 1981).
38. *Nance v. Kier Management Company*, (08-87-08-021-370).
39. 42 U.S.C. Section 4151.
40. 42 U.S.C Section 5301.
41. Uhlhorn, Wm., *Creating a Caring Community: Developing Housing for the Mentally Ill*, *supra* at p. 79.
42. 48 Fed. Reg. 43538 (September 23, 1983).
43. Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, 95 Stat. 357 (1981).
44. 24 C.F.R. Section 570.496, 47 Fed. Reg. 15290, 15395 (April 8, 1982).

ENDNOTES

Chapter XXIX

1. National Council on the Handicapped, Toward Independence (1986).
2. If enacted, the "Americans with Disabilities Act", which was first introduced in the 100th Congress, would provide the comprehensive statutory treatment which is presently lacking. The proposal parallels the scope and coverage of Title VII of the Civil Rights Act, and would thereby afford equal opportunity to the handicapped across a broad social and economic spectrum.
3. National Council on the Handicapped, On the Threshold of Independence (1988).
4. Prewitt v. United States Postal Service, 662 F.2d 292, 302 (5th Cir. 1981).
5. 29 C.F.R § 1613.703.
6. "Targeted disabilities" are defined as disabilities which receive emphasis in affirmative action program planning. They include: deafness, blindness, missing extremities, partial paralysis, complete paralysis, convulsive disorders, mental retardation, mental illness and distortion of limbs and/or spine. *See*, EEOC Managgement Directive 713, at page 3, October 6, 1987.
7. EEOC Management Directive 713 at page B-2 (1987).
8. Statistics are drawn from EEOC annual reports and represent the percentage of persons with targeted disabilities who are employed by the federal government.
9. EEOC FY 1984 Annual Report at page 91.
10. Figures current as of October 1987.
11. EEOC Annual reports 1981-1987.
12. 692 F.Supp. 505 (E.D. Pa. 1988), *aff'd* 865 F.2d 592 (3rd Cir. 1989).
13. 662 F. Supp. 50 (D.D.C. 1987).
14. 480 U.S. 273 (1987).
15. 49 C.F.R. § 391(b)(3), (b)(8).
16. *See*, 14 C.F.R. § 67.14(f)(1)
17. 29 U.S.C. § 793.
18. *See, Myerson v. Arizona*, 709 F.2d 1235 (9th Cir. 1983); *Ernest v.indiana Bell Telephone Co., Inc.*, 717 F.2d 1036 (th Cir. 1983), *cert denied*, 104 S.Ct. 707 (1984); *Beam v. Sun Shipbuilding & Dry Dock Co.*, 679 F.2d 1077 (3rd Cir. 1982); *Davis v. United Airlinesy 662 F.2d 120 (2nd Cir. 1981).*
19. Data provided by OFCCP.
20. *See, Consolidated Rail Corp. v. Darrone*, 104 S.Ct. 1248 (1984); *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980), *vacated and remanded on other grounds*, 451 U.S. 390 (1981); *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3rd Cir. 1979).
21. 47 FEP Cases 1640 (1988). In April 1989, the First Circuit granted a Petition for Rehearing in the case.
22. *Cousins, supra*, 47 F.E.P. Cases at 1647, quoting from *Cannon v. University of Chicago*, 441 U.S. 677, 711 (1979).
23. 29 U.S.C. § 791.
24. Executive Order 12067, June 30, 1978, 43 Fed. Reg. 28967.
25. 42 U.S.C. § 2000e-16, as applied by § 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794a.
26. *See*, Federal Merit Systems Reporter, paragraph 867026, February 27, 1986.
27. *See, Carter v. Tisch*, 822 F.2d 465 (4th Cir. 1987); *Davis v. United Postal Service*, 657 F.Supp. 225 (M.D. Pa. 1987); *Alderson v. Postmaster General of the United States*, 598 F. Supp. 49 (W.D. Okla. 1984).
28. 29 C.F.R. § 1613.701.
29. *See*, 29 C.F.R. § 1613.704.
30. 29 C.F.R. § 1613.705.
31. *See*, 29 C.F.R. Part 404
32. Report of Disability Advisory Council, Executive Summary (1988).
33. Report of Disability Advisory Council, Executive Summary, page 60 (1988).
34. *See*, Pub. L. No. 100-203 § 9010. During the extended period of eligibility, DI and SSI beneficiaries who return to work remain eligible for benefits during periods of non-work.

Chapter XXX

1. *Toward Independence*, National Council on the Handicapped, February 1986, 32. Extensive use has been made of the findings and recommendations of the Council in this chapter.
2. *Id.*
3. *Id.*
4. *Id.*
5. Its legislative authority is codified in 49 U.S.C. 101 et seq.
6. 49 U.S.C. 103.
7. 49 U.S.C. 104.
8. 49 U.S.C. 106.
9. 49 U.S.C. 107.
10. Public Law 98-554.
11. 49 U.S.C. 2507.
12. 49 U.S.C. 1604b.
13. 49 U.S.C. 1612(b).
14. 29 U.S.C. 791
15. 29 U.S.C. 794
16. Public Law 93-112
17. Subpart D
18. Subpart E
19. 49 U.S.C. 1612
20. 49 U.S.C. 1304
21. Established under section 792 of Title 29
22. 49 U.S.C. 1374(c)
23. Public Law 99-435
24. 752 F.2d 694 (D.C.Cir. 1985)
25. 477 U.S. 597 (1986)
26. 618 F.Supp. 1191 (D.D.C. 1985)
27. 57 U.S.L.W. 2145 (E.D.Mo. 1988)
28. 49 C.F.R. Part 609
29. 41 Fed. Reg. 18239
30. 49 C.F.R. 609.3
31. 49 C.F.R. 609.13
32. 49 C.F.R. 609.15
33. 49 C.F.R. 609.17, 609.19
34. 49 C.F.R. 609.23
35. 49 C.F.R. 27.81 et seq., Subpart E of the Department's section 504 regulations;
36. 49 C.F.R. 27.87(c)
37. 655 F.2d 1272 (D.C.Cir. 1981)
38. 49 C.F.R. 27.97
39. 41 Fed. Reg. 17871
40. 655 F.2d 1272, 1275 (D.C.Cir. 1981)
41. 485 F.Supp. 811 (D.D.C. 1980)
42. 442 U.S. 397 (1979)
43. 49 U.S.C. 1612(d)
44. 49 C.F.R. Part 27, Subpart E; published at 51 Fed. Reg. 18944

45. 49 C.F.R. 27.95
46. 56 U.S.L.W. 2401 (E.D.Pa. 1988)
47. 53 Fed.Reg. 23778
48. 49 C.F.R. Part 391
49. 49 C.F.R. 391.41(b)(3)
50. 49 C.F.R. 391.41(b)(8)
51. 107 Sup.Ct. 1123 (1987)
52. 857 F.2d 37 (1st Cir. 1988).
53. 53 Fed. Reg. 42158
54. 51 Fed. Reg. 19032
55. 52 Fed. Reg. 45204
56. 53 Fed. Reg. 42

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Mr. Lyons, an attorney private practice in in Washington, D.C., represents the National Association for Bilingual Education. Previously, he served in the Department of Education and U.S. Commission on Civil Rights.

Marcia Isaacson:

Ms. Isaacson is an Associate in the Washington D.C. office of Dewey, Ballantine, Bushby, Palmer & Wood. Upon graduating from the Stanford Law School in 1986, Ms. Isaacson clerked for Judge Betty Fletcher of the United States Court of Appeals for the Ninth Circuit.

Higher Education

Minority Access -

John Silard:

Mr. Silard is a public interest lawyer in Washington, D.C. specializing in education issues. He served as plaintiffs' counsel in the Adams v. Richardson litigation to desegregate dual systems of higher education.

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Affirmative Action -

Professor Gil Kujovich:

Professor Kujovich is on the faculty of the Vermont Law School. He is the author of "Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal", the first of a series of articles on the role of black public colleges. During 1980, he was an special assistant to Secretary of Education Shirley Hufstedler.

Sex Discrimination -

Ellen Vargyas:

Ms. Vargyas is an attorney with the National Women's Law Center in Washington, D.C. She specializes in sex-equity issues. Before joining the Law Center, she worked for many years in legal services programs. She is a 1974 graduate of the University of Pennsylvania Law School.

Employment Rights

Claudia Withers & Judith A. Winston:

Ms. Withers and Ms. Winston are Deputy Directors of the Women's Legal Defense Fund in Washington, D.C. They specialize in employment and education issues. Ms. Winston formerly served as Deputy Director of the Lawyers' Committee for Civil Rights Under Law. Ms. Withers spent several years in private practice in North Carolina. The Women's Legal Defense Fund report "Expanding Employment Opportunities For Women: A Blueprint for the Future" was the basis of the employment chapter of the Citizens' Commission report.

Tests and Discrimination -

David Rose:

Mr. Rose is presently in private practice in Washington, D.C. specializing in civil rights. He served for many years as Chief of the Employment Litigation Section of the Civil Rights Division of the Department of Justice.

Age Discrimination -

Burton Fretz &
Donna Shue

Prior to joining the National Senior Citizens Law Center as Executive Director in 1981, Mr. Fretz served in the appellate section of the Civil Division of the Department of Justice and was Directing Attorney of the California Rural Legal Assistance Program. Donna Shue is a law clerk at the National Law Center.

Immigration Related Employment Discrimination -

Jonathan Abram:

Mr. Abram, a Washington, D.C. attorney, is the principal author of the Lawyers Committee for Civil Rights Under Law report "Immigration Related Employment Discrimination: A Practical Legal Manual for Evaluating and Pursuing Claims in the Wake of IRCA."

Health

Prenatal Care for Poor and Minority Women -

David Orentlicher & Kristen Halkola

Mr. Orentlicher, a graduate of Harvard Medical and Law Schools, specializes in health law in the Washington, D.C. office of Sidley and Austin. Ms. Halkola a graduate of Amherst in 1988,is a paralegal at Sidley and Austin.

Housing

Mortgage Lending and Community Reinvestment -

Stephen Dane:

Mr. Dane, an attorney in Toledo, Ohio law firm of Cooper, Straub, Walinski & Cramer, has litigated a number of mortgage lending discrimination cases and speaks regularly to lenders, fair housing advocates, and government agencies on lending discrimination matters. He clerked for Judge Pierce Lively of the U.S. Court of Appeals for the Sixth Circuit.

Fair Housing -

Professor Robert Schwemm:

Professor Schwemm is the author of Housing Discrimination Law. Prior to joining the faculty at the University of Kentucky Law School, he was Chief Trial Attorney for the Leadership Council for Metropolitan Open Communities in Chicago, Ill.

Fair Housing Amendments Act of 1988 -

Jeffrey Robinson:

Mr. Robinson is an attorney at the Washington, D.C. law firm of Nussbaum, Owen & Webster. As Chief Counsel to Senator Arlen Spector, Ranking Minority Member of the Senate Subcommittee on the Constitution, Mr. Robinson played a key role in the enactment of the Fair Housing Amendmenta Act of 1988.

LANGUAGE RIGHTS

David Billings:

Mr. Billings, an attorney with the Washington, D.C. firm of Covington & Burling, graduated from Harvard Law School in 1987. He studied European law in Straussberg, France for one year.

Minority Business Development and EEO in Telecommunications

William Kennard:

Mr. Kennard, a Washington, D.C. attorney, is a communications lawyer expert in the FCC's policies on minority business development and equal employment. He represents both major corporate and minority business clients.

Byron Marchant:

Mr. Marchant, an attorney with the Washington, D.C. firm of Sidley & Austin, specializes in communications and corporate law. He graduated from the University of Virginia Law School in 1987.

Jennifer Smith:

Ms. Smith is a Washington, D.C. attorney. From 1986-1988 Ms. Smith was an associate at Holme, Roberts, and Owen, in Denver, Colorado. She graduated from Harvard Law School in 1986.

Political Rights

Voting Rights -

Frank Parker:

Mr. Parker is the director of the Voting Rights Project of the Lawyers Committee for Civil Rights Under Law. He previously managed the Mississippi Office of the Lawyers Committees and has written numerous articles and a forthcoming book on minority voting rights.

Minority Undercount During The 1990 Census -

Anita Hodgkiss:

Ms. Hodgkiss is a plaintiffs' civil rights lawyer in Charlotte, North Carolina. As Senior Editor of the Yale Law Journal, she authored "Petitioning and the Empowerment Theory of Practice" 86 Yale L.J. 569 (1987).

Jim Steinberg:

Mr. Steinberg is a Washington, D.C. attorney. From 1981 to 1982, he served as Minority Counsel to the Senate Committee on Labor and Human Resources.

Institutionalized Persons

Prisons -

Robert Plotkin & Patricia Davison
James Kaufman with
assistance of Jacqueline FitzGerald
Alexandra Oswald and Eric Lasker

Mr. Plotkin is a partner of the Washington D.C. firm of Laxalt, Washington, Perito & Dubuc. He served as Chief of the Special Litigation Section of the Civil Rights Division and chaired the Washington Council of Lawyers' report on "Reagan Civil Rights: The First Twenty Months."

Ms. Davidson graduated from the University of Pennsylvania Law School in 1984 and clerked for Judge John Garrett Penn, U.S. District Court for the District of Columbia.

Mr. Kaufman is a 1987 graduate of the Boston University Law School. Ms. FitzGerald, Ms. Oswald and Mr. Lasker were law clerks at Laxalt, Washington, Periot and Dubuc during the summer of 1988.

Institutionalized Disabled Persons -

Professor Robert Dinerstein:

Professor Dinerstein is on the faculty of the American University Washington College of Law. He is the author of "The Absence of Justice," 63 Nebraska L.Rev. 860 (1984) which reviews the effect of the Reagan administration's enforcement of the Constitutional Rights of Institutionalized Persons Act on institutionalized disabled persons.

Rights of the Disabled

Department of Housing and Urban Development -

Bonnie Milstein:

Ms. Milstein is an attorney with Mental Health Law Project in Washington, D.C. As an expert on health and disability rights issues, Ms. Milstein played a key role in the major legislative battles during the past decade. She previously served as an attorney at the Department of Health, Education and Welfare and Center for Law and Social Policy.

Departments of Health and Human Services, Education, and Transportation -

David Chavkin:

Mr. Chavkin is a Senior Program Analyst with the National Center for Clinical Infant Programs in Washington, D.C. He previously served as Deputy Director of the Office of Civil Rights in the Department of Health and Human Services during the Carter Administration. He has specialized in poverty and civil rights issues since 1968.

Employment Issues -

Stanley Freeman:

Mr. Freeman an attorney with the Washington, D.C. firm of White, Fine & Verville He specializesg in plaintiffs' disability, employment, and health issues.

AIDS and HIV-Infection -

Chai Feldblum:

Ms. Feldblum is legislative Counsel for the ACLU AIDS Project. She previously clerked for Justice Harry Blackmun, United States Supreme Court, and Judge Frank Coffin, U.S. Court Appeals for the First Circuit. She graduated from Harvard Law School in 1985.

Appendix to Chapter XXIII

Case/Investigation	Date Initiated	Actions Taken	Present Status
Dauphin County-Prisons (Pa.)	10/05/80		Pending
Ahica	11/14/80	Finds of investigation, 9/02/82, no egregious violations	Case closed
Wisconsin Prison	12/03/80	Findings of investigation, 06/17/82, state plan while troubling found adequate	Pending
Deer Island House of Corrections (Boston)	12/03/80	Findings of investigation 5/18/82	Pending
Western State Correctional (Pa)	12/12/80	Investigation reported to state, voluntary state plans corrected problems	Closed
Youth Development Center (Pa.)	12/15/80	Findings of investigation, 3/18/82, voluntary state improvements subsequent	Closed
West Virginia Inustrial School for Boys	02/24/81	Findings of investigation, 3/18/82, State agreed to provide periodic reports	Closed
Santana v. Collazo Puerto Rico Juvenile Camps	12/06/78 (Plaintiff-Intervenor)	U.S. dismissed in 9/11/80, allowed to intervene under CRIPA 1/27/80; post-trial brief filed 11/2/81	Court opinion 02/17/82
Youth Development, Center (NH)	05/11/82	Investigation, state and private litigants negotiate	Closed 08/30/84
Newark City Jail	04/07/82	Findings of investigation, 07/13/82. Suit filed 02/02/84. Settlement July 15, 1985	Consent decree being moniored
Essex County Jail Annex	04/07/82	Consent Judgment signed as a result of suit by NJ Public Advocate	Case closed 08/23/82

Harrison County Jails (Biloxi, Gulfport Miss.)	08/19/82	Investigation delayed (Bil.) fire 11/82. Findings (Gulf) 2/8/84. Voluntary improvements and new procedures satisfactory. 1/28/85	Case closed 01/28/85
Talledegz County Jail (Alabama)	08/27/82	Notified intent to file complaint, 7/7/83; state allowed investigation. suit filed 9/17/85. Settled	Settlement (Consent) agreement being m,onitored
U.S. v. Elrod, Case remanded by 7th Circuit in 1980	Investigations during 1982 fiscal year	10/08/82 investigation and consent decree in related case, no further action needed	Closed
Michigan Prisons	10/09/81	Findings of investigation 11/01/82, suit filed consent decree entered 7/16/84	Consent decree being monitored
Halawa High Security Facility (Hawaii)	06/10/82	Suit filed 3/4/83, dismissed 5/10/83, investigation begun without refiling, settlement in NPP class action case	Closed
Grenada County Jail (Miss.)	11/01/82	Findings of investigation. 2/22/84, areas of concern but no Constitutional violations	Closed
Ada County Jail (Idaho)	01/06/83	Findings of investigation 4/18/84, consent decree 5/23/85	Consent Decree being monitored
Graterford State Prison (Pa.)	04/26/83	Letter to Governor 8/3/83 findings of investigation, 4/26/84 no Constitutional violation	Closed
Ossining Correctional Facility (NY)	06/20/83	Investigation found absence of constitutional violation, 8/13/86	Closed
Bedford County Jail (Tenn.)	03/05/84	Findings of investigation 8/29/84 Case settlement 1/17/85	Case settlement

Clinton Correctional Facility (NY)	05/20/84	Review of report of guard brutality	Pending
Julia Tutasiler Prison For Women (Alabama) (equal protection case)	07/03/84	Notice to Governor of Constitutional violations, 3/24/85	Pending
Los Angeles County Juvenile Halls (Ca.)	03/28/85	Suit filed to obtain access. 3/27/86	Pending
Youth Guidance Center (San Francisco, Ca.)	03/28/85	Notification of findings, 8/26/88 Constitutional violations	Pending
California Medical Facility of Department of Corrections	03/07/85		
Golden Grove Correctional Institutional (St. Croix, VI)	05/28/85	Notification of findings 1/23/86 Constitutional violations	Pending
Cummins Unit of Arkansas Department of Corrections	09/18/85		Investigation in progrress
Aganz Adult Correctional Facility (Guam)	05/12/86	7/86, fire safety inspection	Pending
Preston School of Industry (Ca.)	12/11/85	Notification of findings 9/10/86, Constitutional violations	Pending
Essex County Youth House	01/06/86	Notification of findings 7/23/86, Constitutional violations	Pending
Jefferson County Jail (Ohio)	12/16/85	Notification of findings fire safety violations	Consent decree negotiations
Santa Rite Jail (Ca.)	09/17/86		Pending
Missouri Training Center for Men (Moberly, MI)	12/09/85		Pending
Kansas State Penitentiary (Lansing, Ka.)	02/18/86		Pending
Folsom State Prison (California)	?	Letter to Governor, 9/21/82 Tour 1/83 Findings of investigation 4/3/84	Closed after private litigants won class action 3/18/85

Cook County Jail (Illinois)	?	Investigation found found state efforts sufficient (1984)	Closed
Los Angeles County Jails (Ca.)	?		Closed
Sandusky County Jail	?		Pending

This report documents a distressing period in the modern history of civil rights. The Commission's excellent study describes the Reagan Administration's relentless retreat from America's bipartisan commitment to eradicate discrimination in our society. On a more hopeful note, the report also provides a blueprint for resuming progress toward our constitutional ideal of equal justice for all. It should be required reading for the new Congress and the new Administration.

Senator Edward M. Kennedy of Massachusetts
Chairman, Senate Committee on Labor and Human Resources

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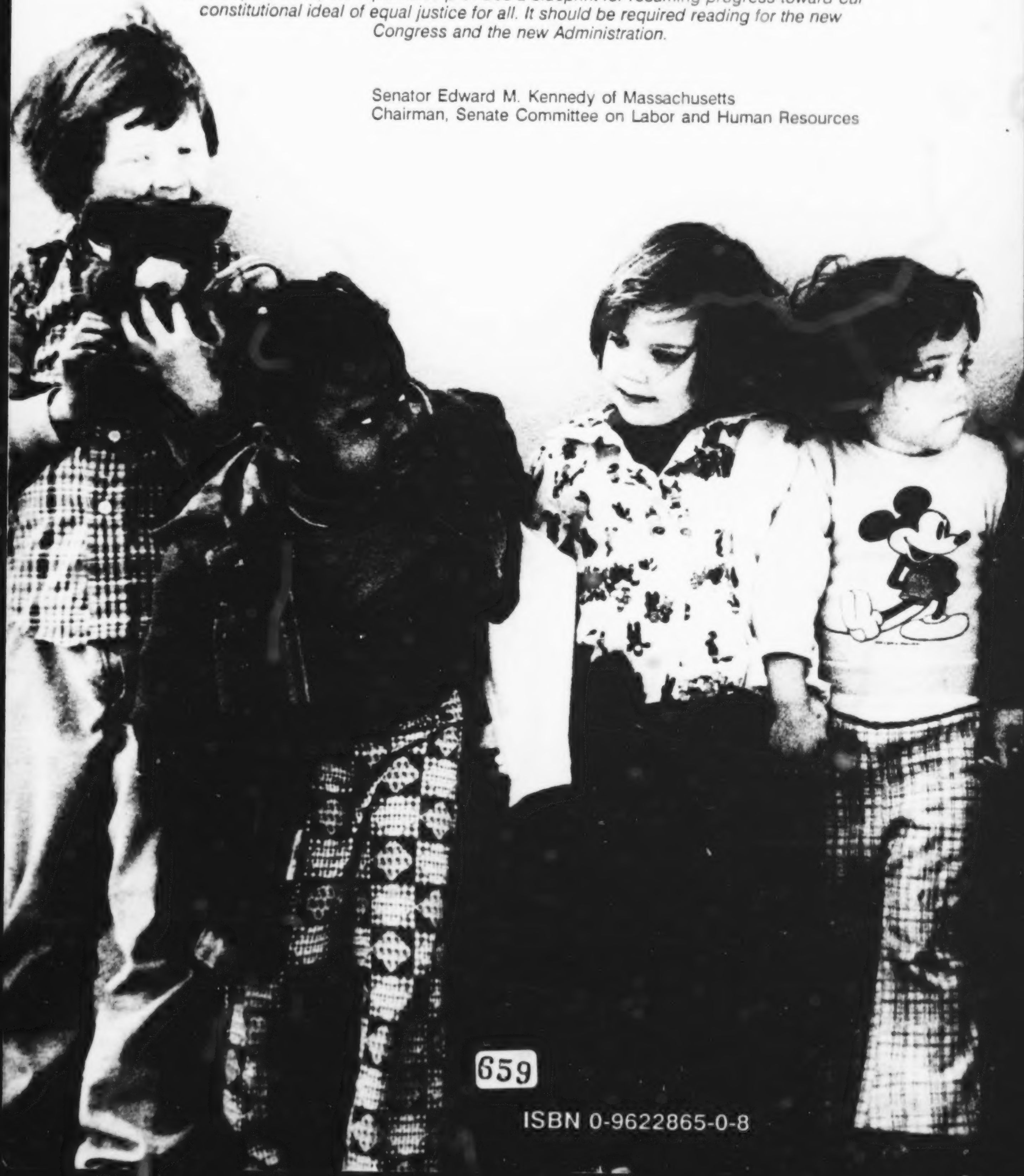

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